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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

HARRIET PAULEY, Survivor of JOHN C. PAULEY, *Petitioner*

v.

BETHENERGY MINES, INC., and DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

CLINCHFIELD COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and JOHN A. TAYLOR

CONSOLIDATION COAL COMPANY, *Petitioner*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, and ALBERT C. DAYTON

On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

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BRIEF FOR PETITIONER HARRIET PAULEY (No. 89-1714)

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QUESTIONS PRESENTED

1. Whether the Department of Labor ("DOL") interim regulation's "disability causation" rebuttal test at 20 C.F.R. § 727.203(b)(3) violates the "not . . . more restrictive" mandate of Section 402(f)(2) of the Black Lung Benefits Act, 30 U.S.C. § 902(f)(2), when applied to claimants who meet the invocation requirements of the Department of Health, Education, and Welfare ("HEW") interim provision at 20 C.F.R. §§ 410.490(b)(1)(i) and (b)(2)?

2. Whether Section 402(f)(2) of the Black Lung Benefits Act, if construed to prohibit the Secretary of Labor from imposing a "disability causation" factual inquiry for black lung benefits under the DOL interim regulation, violates the due process clause of the fifth amendment to the United States Constitution?

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On Writs Of Certiorari To The United States Courts Of Appeals For The Third and Fourth Circuits

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BRIEF FOR PETITIONER HARRIET PAULEY (No. 89-1714)

OPINIONS BELOW

The opinion of the Third Circuit below is reported at 890 F.2d 1295. (P. App. 1-19)[1] The decision and order of the Benefits Review Board (*id.* at 20-22) and the decision and order of the administrative law judge (*id.* at 23-41) are unreported.

JURISDICTION

The Third Circuit entered its judgment on December 7, 1989. (*Id.* at 44-45) It denied a petition for rehearing on February 6, 1990. (*Id.* at 42) Petitioner filed her petition for certiorari on May 7, 1990. On October 29, 1990, this Court granted that petition, consolidating this case with Nos. 90-113 and 90-114. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The fifth amendment to the United States Constitution; Sections 401(a), 402(f), and 422(c) and (j) of the Black Lung Benefits Act, 30 U.S.C. §§ 901(a), 902(f), 932(c),(j); 26 U.S.C. § 9501(d)(1); 20 C.F.R. §§ 410.412, 410.490, 727.203; Sections IB6(e) and IB9(g) of the Coal Miner's Benefits Manual (Part IV). App. 1-13 sets forth each of these provisions.

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[1] Citations such as "P. App. 10" are to pages of the Appendix to our Petition for Writ of Certiorari (No. 89-1714). Citations to record items not in the P. App. are to the relevant pages of the record item in the "Index of Documents" that the Department of Labor prepares for each case appealed from the Benefits Review Board to a court of appeals (*e.g.*, Tr. of Hearing at 10). The constitutional, statutory, and regulatory provisions involved are set forth in the appendix to this brief. App. 1-13.

STATEMENT

A. John Pauley.

John Pauley, petitioner Harriet Pauley's husband,[2] worked as a coal miner for thirty years in the underground mines of Pennsylvania. (P. App. 25) All his mining jobs exposed him to heavy concentrations of coal mine dust. (Tr. of Hearing at 13-14) As a "fire boss" (mine examiner), Mr. Pauley's last job in the mines, he was required to walk or crawl along three to six foot high belt line haulage ways for six to eight miles a day. (P. App. 25)

In 1974, after he had worked in the mines for 26 years, Mr. Pauley began to have great trouble breathing. (*Id.*) He also began to cough frequently and to feel fatigued. (*Id.*) These medical difficulties steadily worsened. (*Id.*) On August 2, 1978, Mr. Pauley worked in the coal mines for the last time. (*Id.*) The next day he went on sick leave. (*Id.*) He never worked again. (Tr. of Hearing at 11)

Until his death in 1988, Mr. Pauley's breathing difficulties continued to worsen progressively. (*Id.* at 21) By 1983, he had trouble breathing whenever he went outside. (*Id.* at 21; P. App. 25) And by November 1987, he could not walk more than 300 or 400 yards without becoming "out of breath" or climb any steps without becoming "short of breath." (Tr. of Hearing at 15) He also frequently wheezed and coughed and suffered "sputtering spills," especially at night. (*Id.* at 21-22; P. App. 25) He could not lift anything. (Tr. of Hearing at 15; P. App. 25)

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[2] John Pauley died in 1988. His widow, Harriet Pauley, was thereafter substituted for him as a party in this litigation. *See* Brief of Petitioner in Reply at 2-3.

B. Statutory And Regulatory Background.

1. "Disability Causation" And The HEW Interim Provision.

Congress established the black lung benefits program in 1969[3] and charged the Secretary of Health, Education and Welfare ("HEW") with its management.[4] At the inception of the program, physicians had testified to Congress concerning the great difficulty of determining medically whether a particular miner's disability was caused by his coal mine employment or was attributable to other factors, such as cigarette smoking and mold allergy. *E.g.*, *Coal Mine Health and Safety: Hearings Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 91st Cong., 1st Sess. 559 (1969) (testimony of William C. Hambley, M.D.). And officials of HEW's Social Security Administration ("SSA") themselves soon discovered that it was "virtually impossible to medically determine to what extent, if any, CWP [coal workers' pneumoconiosis] contributed to disability or death." General Accounting Office, Report to the Congress: Achievements, Administrative Problems, and Costs In Paying Black Lung Benefits To Coal Miners And Their Widows 31 (1972) [hereinafter *1972 Comptroller General's Report*]. The great uncertainty attending medical determinations of whether a miner's disabilities were attributable to coal mine em-

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[3] The black lung benefits program was established by Title IV of the Federal Coal Mine Health and Safety Act of 1969, Pub. L. No. 91-173, 83 Stat. 792 (1969). In 1972, Title IV was amended by and became known as the Black Lung Benefits Act of 1972 (the "Act"). Pub. L. No. 92-303, § 1, 86 Stat. 150 (1972).

[4] The Act charged the Secretary of Labor with processing claims filed after December 31, 1972. Pub. L. No. 91-173, § 422(a), 83 Stat. 796. The federal respondent here, the Director, Office of Workers' Compensation Programs (the "Director"), currently administers the program for the Secretary of Labor. We refer to the "Secretary of Labor" and the "Director" interchangeably.

ployment presented the HEW officials administering the pre-1972 program with a "dilemma, that is whether it should award or deny benefits to disabled miners who are afflicted with simple CWP as well as with one or more other conditions which may be the cause of their disabilities." *Id.* at 33. "[B]ased on . . . [this] inability to medically determine if miners' disabilities were due to simple CWP or to one or more other conditions," HEW officials established a "policy . . . [of] award[ing] benefits in all such cases." *Id.* at 33. "The officials believed that—under the circumstances—resolving the problem in favor of the claimants was the only reasonable decision that could have been made." *Id.* at 34.[5]

[5] In *Usery v. Turner Elkhorn Mining Co.* 428 U.S. 1 (1976), the Court pointed out that, according to congressional testimony presented on behalf of the Surgeon General, pneumoconiosis is customarily classified as "simple" or "complicated" and then stated that "[s]imple pneumoconiosis . . . is generally regarded by physicians as seldom productive of significant *respiratory* impairment." 428 U.S. at 7 (emphasis added); *see also Sebben*, 488 U.S. at 149 (Stevens, J. dissenting) (quoting *Usery*). However, the Surgeon General's testimony that the Court cited actually says that "[i]t is generally regarded by physicians that simple pneumoconiosis seldom produce[s] significant *ventilatory* impairment." H.R. Rep. No. 563, 91st Cong., 1st Sess. 16 (1969) (emphasis added) (testimony of Charles C. Johnson, Jr., Administrator, Consumer Protection and Environmental Health Service, HEW). The distinction between "respiratory impairment" and "ventilatory impairment" is significant because "ventilation" is only one of the three components of "respiration." §§ 718.202(a)(1)(ii)(B), 727.206(b)(2)(ii). Indeed, according to the Surgeon General's testimony, simple pneumoconiosis may well impair the capacity for "diffusion," a second component of "respiration." H.R. Rep. No. 563, 91st Cong., 1st Sess. 16 (1969). The Surgeon General's testimony did not suggest that simple pneumoconiosis does, or that it does not, impair the capacity for "perfusion," the remaining component. *Id.*

Moreover, "simple" and "complicated" are merely *medical* designations of the types of pneumoconiosis that x-rays can reveal. *Id.* Medically, "pneumoconiosis" is defined as "inflammation commonly leading to fibrosis of the lungs due to irritation caused by the in-

(Footnote continued on following page)

Following a HEW report to Congress in 1972, a House committee recognized that the "occupational or causal connection between disability or death and pneumoconiosis has posed a very difficult problem from a medical standpoint." H.R. Rep. No. 460, 92d Cong., 1st Sess. 29 (1972). Indeed, HEW was faced with a substantial backlog of claims, and HEW officials believed that one of its "primar[y]" causes was the "lack of medical criteria for determining when miners are totally disabled due to black lung. . . ." *1972 Comptroller General's Report*, p. 3 *supra* at 2. Consistently, the Senate Labor and Public Welfare Committee, considering changes in the program to rectify this backlog of claims and an unacceptably low claims approval rate, S. Rep. No. 743, 92d Cong., 2d Sess. 3, 18 (1972), attributed both problems to two related factors. The "limited medical resources" in coal mining areas, including trained physicians and testing facilities, and the "state of the [medical] art" each made it very difficult for miners to provide the requisite medical evidence proving that the disability from which they suffered, often "severely," was caused by pneumoconiosis. *Id.* at 9, 18.

That same year, the Comptroller General, after thoroughly investigating the program, prepared a report for Con-

[5] *continued*
halation of dust incident to various occupations, such as coal mining, knife grinding, stone cutting, etc." Stedman's Medical Dictionary 1108 (24th ed. 1982). However, the Act as amended in 1978, Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, § 2(a), 92 Stat. 95 (1978), defines "pneumoconiosis" differently as "a chronic dust disease of the lung and its sequelae, *including respiratory and pulmonary impairments, arising out of coal mine employment.*" 30 U.S.C. § 902(b) (emphasis added). The statutory definition of "pneumoconiosis" (sometimes called "legal pneumoconiosis") is therefore broader than the medical one in that it includes all respiratory and pulmonary impairments arising out of coal mine employment. Thus, a miner may well have "legal pneumoconiosis" that contributes to his disability whether or not he has "medical pneumoconiosis" shown by x-rays.

gress. *1972 Comptroller General's Report*, p. 3 *supra*. In it he concluded that "the most significant [reason for the difficulties that have beset the program during its first three years] may be that it is virtually impossible to determine to what extent, if any, miners' disabilities or deaths can be attributed to CWP and to what extent the disabilities or deaths can be attributed to one or more other conditions." *Id.* at 40; *see also id.* at 31.

The Senate committee's report accompanying the 1972 amendments to the Act expressed its expectation that HEW would "adopt such interim evidentiary rules and disability evaluation criteria as will permit prompt and vigorous processing of the large backlog of claims." S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). HEW officials believed that the only "practicable way" to comply with this instruction and to rectify Congress' dissatisfaction with the low claims approval rate, was to design very liberal "criteria which would detect disease," *Oversight of the Administration of the Black Lung Program, 1977: Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources*, 95th Cong., 1st Sess. 194 (1977) [hereinafter *1977 Senate Hearings*] (statement of Herbert Blumenfeld, M.D., Chief, Medical Consulting Staff, Bureau of Disability Insurance, SSA), as distinguished from the severity or cause of a miner's disability.

HEW's product, its interim provision at 20 C.F.R. § 410.490,[6] was designed for "expediency." *Black Lung Benefits Provisions of the Federal Coal Mine Health and Safety Act: Hearings Before the House Comm. on Education and Labor*, 95th Cong., 1st Sess. 274 (1977) [hereinafter *1977 House Hearings*] (testimony of Harold I. Passes, M.D, former Acting Chief Medical Officer, Bureau of Hearings and Appeals, SSA). Under the HEW interim provision, a claimant could obtain the benefit of either of two presumptions that he was "totally disabled due to pneumoconiosis." § 410.490(b). He could invoke the first presumption if x-ray, biopsy, or autopsy evidence showed that he had medical pneumoconiosis, § 410.490(b)(1)(i), and if he worked at least ten years in the mines or proved that his pneumoconiosis arose out of coal mine employment. § 410.490(b)(2) (referencing §§ 410.416, 410.456).[7] "Both presumptions were rebuttable by a showing that the miner was working or could work at his former mine employment or the equivalent." *Sebben*, 488 U.S. at 109.

[6] All citations to 20 C.F.R. are to the 1990 edition. The numerous citations in this brief to provisions of 20 C.F.R. usually omit the "20 C.F.R" reference. However, when we refer to the two principal regulatory provisions at issue here, we often call them by their popular names: the "HEW interim provision" (§ 410.490) and the "DOL interim regulation" (§ 727.203).

2. The Section 402(f)(2) Compromise And The DOL Interim Regulation.

As Congress had wished, the liberal eligibility criteria in the HEW interim presumption at § 410.490 produced a significant increase in the portion of Part B claims the agency approved, up from less than fifty percent to seventy percent. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972); *1977 Senate Hearings*, p. 6 *supra* at 165 (testimony of Richard Warden, Assistant Secretary for Legislation, HEW).

[7] Mr. Pauley's x-ray evidence and long tenure working in the mines invoked this first presumption under §§ 410.490(b)(1)(i) and (b)(2). We refer to cases like his, in which the claimant successfully invoked the HEW interim provision by x-ray, biopsy, or autopsy evidence, as "x-ray cases." A claimant could obtain the benefit of the HEW interim provision's second presumption by ventilatory study evidence, §§ 410.490(b)(1)(ii), (b)(3), as our fellow claimant in No. 90-114 did. Our fellow claimant in No. 90-113 invoked the separate DOL interim presumption by blood gas study evidence. § 727.203(a), (a)(3). Issues unique to their cases ("ventilatory study cases" and "blood gas study cases," respectively) will be discussed in their briefs.

In contrast, the Department of Labor ("DOL") approved less than ten percent of the Part C claims filed after July 1, 1973 when it adjudicated them only under the strict Part 410 permanent regulations. 1976 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act 5 (1977) [hereinafter *1976 Annual Report*].

The United Mine Workers ("UMW") was extremely dissatisfied with the low DOL approval rate for Part C claims. Accordingly, in 1973 its president urged Congress to amend the Act to "provide that the interim standards . . . become the permanent standards used . . . in processing black lung claims." *Black Lung Amendments of 1973: Hearings on H.R. 3476, H.R. 8834, H.R. 8835 and H.R. 8838 Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st and 2d Sess. 349 (1973-1974) (statement of Arnold Miller, President of the UMW). Another UMW official told Congress that the UMW intended that such a provision would "assure continuation of the program at no less than the current standards" and "deal with the substantive inequities" between Part B and Part C claimants. *Id.* at 353 (statement of Bedford W. Bird, Deputy Director, Department of Occupational Health, UMW).

Evidence presented to Congress in the years after the initiation of the Part C program demonstrated the persistence of problems that had led to promulgation of the HEW interim provision, including deficiencies in medical test procedures and an insufficient number of adequate medical testing facilities. H.R. Rep. No. 151, 95th Cong., 1st Sess. 15, 17 (1977). Witnesses before the House Committee on Education and Labor cited in particular the continuing medical uncertainty and difficulties attending determinations about whether a miner's disability was attributable to his coal mine employment. *1977 House Hearings*, pp. 6-7 *supra* at 265 (testimony of Hans Weill, M.D.,

President of the American Thoracic Society, stating that there was "no [medically reliable] way . . . to know whether . . . lung impairment is due to pneumoconiosis or to dust or to exposure to cotton specifically or whether it is related to cigarette smoking or tuberculosis or silicosis or many of the other diseases of the lung which affect the population of the country"); *id.* at 144 (testimony of Ken Yablonski, Director of District 5, United Mine Workers, stating that there are "apparently irreconcilable diverse opinions among medical experts" in the run of cases as to whether coal workers' pneumoconiosis has "caused" disability); *Black Lung Benefits Eligibility (Oversight): Hearing Before the General Subcomm. on Labor of the House Comm. on Education and Labor*, 93d Cong., 1st Sess. 82 (1973) (testimony of Lowell Martin, M.D., stating that "correlating [shortness of breath] with his [a miner's] job . . . is one heck of a problem when you want to get scientific, because . . . bronchitis, emphysema, and asthma may . . . [look like] the same thing [as] pneumoconiosis").

To several congressmen, proof problems like this explained why DOL had denied benefits to so many of their coal mine constituents, when the congressmen, having personally observed the severe respiratory distress such miners regularly experienced, believed they were totally disabled due to pneumoconiosis. *See, e.g., Black Lung Benefits Reform Act of 1975: Hearings on H.R. 7, H.R. 8, and H.R. 3333 Before the Subcomm. on Labor Standards of the House Comm. on Education an Labor*, 94th Cong., 1st Sess. 144 (1975) (remarks of Rep. Perkins); *1977 House Hearings*, pp. 6-7 *supra* at 265 (remarks of Rep. Simon); 122 Cong. Rec. 4978 (1976) (remarks of Rep. Daniels); 123 Cong. Rec. 24266 (1977) (remarks of Sen. Williams, stating that "a reason for this low claim approval rate is that . . . [m]edical evidence is often imprecise and difficult to evaluate. Symptoms can be confusing. Often . . .

doctors are not sufficiently skilled in diagnosing black lung. In many cases the illness . . . of a miner due to black lung has been attributed to some other cause."). HEW and DOL officials believed, however, that the HEW interim criteria were too liberal and had resulted in awards of benefits to some miners who were not in fact disabled due to pneumoconiosis. *1977 Senate Hearings*, p. 6 *supra* at 193-94 (testimony of Herbert Blumenfeld, M.D.); *id.* at 142, 146 (testimony of Donald Elisburg, Assistant Secretary of DOL, accompanied by June Patron, Director, O.W.C.P.); *1977 House Hearings*, pp. 6-7 *supra* at 274-75 (testimony of Harold I. Passes, M.D.).

Just as the low HEW claims approval rate had prompted legislation in 1972 to increase approvals in the Part B program, the much lower DOL approval rate thereafter prompted new legislative proposals to achieve the same end under the Part C program. In 1977 Rep. Perkins of Kentucky introduced H.R. 4544. H.R. 4544, 95th Cong., 1st Sess. (1977). Section 7 of that bill was drafted to do what the UMW wanted done: it would have amended the statutory definition of "total disability" to provide:

> With respect to a claim filed after June 30, 1973, such regulations [defining "total disability"] shall not provide more restrictive criteria than those applicable to a claim filed on June 30, 1973 [*i.e.*, than those applicable under the HEW interim presumption].

Id. at § 7 (1977). Thus, under the House measure, the liberal HEW interim provision would have become the restrictiveness ceiling for *all* claims filed after June 30, 1973, including claims that had previously been denied under the permanent Part 410 regulations (*i.e.*, all Part C claims). The House passed H.R. 4544. 123 Cong. Rec. 29851 (1977).

The Senate then passed S. 1538. S. 1538, 95th Cong., 1st Sess. (1977); 123 Cong. Rec. 29924 (1977). Instead of including a measure for adjudicating claims under standards "not . . . more restrictive" than those of the HEW interim provision, Section 2 of the Senate bill directed the Secretary of Labor to develop new permanent standards for all Part C claims that would "accurately reflect total disability in coal miners. . . ." *Id.* at § 2. Dissatisfied with DOL's low claims approval rate, the members of the Senate Committee that sent the bill to the floor "assumed that the [permanent] regulations regarding what constitutes 'total disability,' which will be promulgated by the Secretary of Labor, will be equivalent to the [HEW] interim medical standards." S. Rep. No. 209, 95th Cong., 1st Sess. 25 (1977); *see also id.* at 14. At the same time, the terms of the Senate bill itself clearly authorized the Secretary of Labor to promulgate eligibility standards for Part C claims that differed in their degree of restrictiveness from those found in the HEW interim provision. As HEW and DOL officials were on record as believing that the HEW interim provision was far too liberal and had resulted in benefit awards to some claimants who were not disabled due to pneumoconiosis, *see* p. 10 *supra*, the industry had every reason to expect that DOL's permanent standards would in fact be much stricter than the HEW interim standards. Accordingly, the Senate bill was much more favorable to the industry than the House bill.

The bill that emerged from the conference committee charged with considering the House and Senate bills embodied an outcome that compromised the legislative ambitions of both the miners and the industry. What had been Section 7 of H.R. 4544, the UMW measure, was enacted as Section 402(f)(2) of the Act, 30 U.S.C. § 902(f)(2). It required the application of "criteria . . . not . . . more restrictive" than those under the liberal HEW provision, but only as to pending claims, previously denied claims, and claims filed before the effective date of new permanent regulations the Secretary of Labor was to develop. *Id.*

What had been Section 2 of S. 1538, the industry measure, was enacted as Section 402(f)(1)(D) of the Act, 30 U.S.C. § 902(f)(1)(D). It required the application of "criteria . . . which accurately reflect total disability in coal miners" to all claims filed after the effective date of the new permanent regulations the Secretary was to develop. *Id.*[8]

Legislators in both houses that spoke to the compromise measure after it emerged from conference emphasized that they understood it to ensure parity—equal treatment—of Part B claimants and those Part C claimants subject to Section 402(f)(2). For example, Rep. Perkins, the House manager of the bill, stated that "all of the denied and pending claims subject to review under the legislation will be evaluated according to the [HEW] 'interim' standards," which "will continue to apply into the future as well, until such time as the Secretary of Labor promulgates new [permanent] regulations. . . ." 124 Cong. Rec. 3426 (1978). He also stated that "this legislation gives no authority to the Labor Secretary to alter, adjust, or otherwise change the [HEW] interim standards. . . ." *Id.* at 3431. Similarly, Sen. Javits stated: "I believe it would be inequitable, and contrary to sound program administration, if the Departments of Labor and HEW were to give disparate treatment to claimants in carrying out their dual responsibilities. . . ." *Id.* at 2334 (1978). *See also, e.g., id.* at 2331 (statement of Sen. Randolph, the Senate manager of the bill).

As its response to the "not . . . more restrictive" mandate in Section 402(f)(2), DOL promulgated its own interim regulation at § 727.203. This regulation, like the HEW interim provision, permits a miner to invoke a presump-

[8] These new permanent regulations were eventually promulgated at 20 C.F.R. Part 718, effective March 31, 1980. 45 Fed. Reg. 13678 (1980).

tion that he is "totally disabled due to pneumoconiosis" if, *inter alia*, x-ray, biopsy, or autopsy evidence establishes that he has pneumoconiosis. §§ 727.203(a), (a)(1). Unlike the HEW interim provision, however, the DOL interim regulation permits rebuttal of its presumption by any of four methods. § 727.203(b).

C. This Litigation.

John Pauley filed a claim for black lung benefits on April 21, 1978. (P. App. 25) The medical evidence submitted at the hearing on his claim included 11 x-rays dating from January 1975 to September 1987, all of which showed that Mr. Pauley suffered from pneumoniosis. (*Id.* at 26) Mr. Pauley's employer, Bethenergy Mines, Inc. ("Bethenergy") conceded, and the Administrative Law Judge ultimately found, both that Mr. Pauley had pneumoconiosis and that it had arisen out of his coal mine work. (*Id.* at 36) Hence, the ALJ concluded that Mr. Pauley, who had worked thirty years in the mines (*id.* at 25), successfully invoked both the DOL interim regulation by satisfying §§ 727.203(a)(1) (*id.* at 36) and the HEW interim provision by satisfying §§ 410.490(b)(1)(i) and (b)(2). (*Id.* at 39)

The ALJ also found that Mr. Pauley had not worked for the previous ten years and that his afflictions were severe enough to be totally disabling. (*Id.* at 36) On this basis the ALJ concluded that Bethenergy had rebutted neither the DOL interim regulation under § 727.203(b)(1) or (b)(2) (*id.*) nor the HEW interim provision under § 410.490(c)(1) or (c)(2). (*Id.* at 39-40) The ALJ further determined that three of the physicians who examined Mr. Pauley submitted opinions concluding that Mr. Pauley's disability arose, in whole or in part, out of coal mine employment (*i.e.*, that Mr. Pauley had established "disability causation"). (*Id.* at 30, 32-33, 38) But the ALJ determined that the opinions of four other physicians were to the contrary (*id.* at 29-34,

37) and concluded that Bethenergy had rebutted the DOL interim presumption under the "disability causation" rebuttal test at § 727.203(b)(3). (*Id.* at 38)[9]

The ALJ nonetheless awarded Mr. Pauley benefits because § 727.203(b)(3) was not present in the HEW interim provision, so that applying that rebuttal test to deny benefits would violate Section 402(f)(2) of the Act under then-governing Third Circuit case law. (*Id.* at 39-40) The Benefits Review Board affirmed. (*Id.* at 20-22) However, the Third Circuit reversed with directions to enter an order denying benefits. (*Id.* at 1-19)

SUMMARY OF ARGUMENT

Section 402(f)(2) of the Act, which prohibits the Secretary of Labor from adjudicating claims like Mr. Pauley's using "criteria" that are "more restrictive" than the "criteria" of the HEW interim provision, requires reversal of the court of appeals' judgment and reinstatement of the ALJ's benefits award.

A. The DOL interim regulation's "disability causation" rebuttal test at § 727.203(b)(3) is a more restrictive criterion than the criteria of the HEW interim provision. Unlike the DOL interim regulation, the HEW interim provision does not authorize benefit denials based upon a fac-

[9] The ALJ counted Drs. Bradley and Lantos as two of four doctors whose opinions he believed opposed Mr. Pauley under § 727.203(b)(3). (P. App. 37) However, the ALJ's accurate descriptions of the admissions that Drs. Bradley and Lantos made when testifying indicate that the ALJ should instead have counted them as two of five doctors whose opinions supported Mr. Pauley under § 727.203(b)(3). (*Id.* at 31-32) ("Dr. Bradley did admit that he could not rule out entirely any contribution of coal dust and silica inhalation . . . to claimant's overall impairment. . . ."); (*id.* at 34) (Dr. Lantos "admitted" that Mr. Pauley's "occupationally acquired pulmonary disease . . . may be a detrimental aspect of his overall condition.")

tual determination adverse to the miner respecting "disability causation." Rather, under the HEW interim provision, "disability causation" is conclusively presumed when a miner proves, as Mr. Pauley did, that he has pneumoconiosis as shown by x-ray, biopsy, or autopsy evidence, § 410.490(b)(1)(i), and that his pneumoconiosis arose out of his coal mine work, § 410.490(b)(2), and his opponent is unable to prove that he is performing, or is able to perform, his prior coal mine work or its equivalent. §§ 410.490(c)(1),(2). The court below disagreed, holding that parenthetical citations to § 410.412(a)(1) in the rebuttal subsections of the HEW interim provision, §§ 410.490(c)(1) and (c)(2), implicitly incorporate a "disability causation" factual inquiry like the one in the DOL interim regulation at § 727.203(b)(3). But the court's conclusion is incompatible with every authoritative source guiding the search for the meaning of legal tests.

1. The text of the HEW interim provision itself contradicts the court's conclusion. The subsections of the HEW interim provision that contain the parenthetical citations also contain substantive texts, which address only the "disability severity" element of a claim, a different element than "disability causation." Thus, reading the parenthetical citations to refer to "disability causation" would be counter-intuitive. Moreover, the ten other sections of the regulations that contain identical or related parenthetical citations are all in harmony with our position that the HEW interim provision lacks a "disability causation" factual inquiry and contradict the court of appeals' contrary reading.

2. The conclusion of the court below is also incompatible with HEW's contemporaneous interpretation of its interim provision that it set forth in Part IV of its Coal Miner's Benefits Manual as well as with the judicial interpretations of the HEW interim provision. More than 400,000

claims have been adjudicated under the HEW interim provision, producing hundreds, if not thousands, of published decisions in x-ray cases. But we are unaware of any such decision, other than the one below, in which any adjudicator, at any administrative or judicial level, construed the HEW interim provision to permit a "disability causation" factual inquiry. Indeed, the reported decisions uniformly support our position that the HEW interim provision contains no such factual inquiry.

3. HEW's omission of a "disability causation" factual inquiry from its interim provision was a reasonable and lawful agency decision that was directly responsive to Congress' wishes. The HEW officials charged with administering the black lung program and with drafting the HEW interim provision believed that the task of determining medically whether a miner's disability arose out of his coal mine employment was "virtually impossible" and that the tasks of accumulating medical opinions regarding "disability causation" and of thereafter resolving conflicting determinations of the issue had contributed greatly to the backlog of claims that Congress had found objectionable and said it wanted eliminated. In this context, excluding a "disability causation" factual inquiry from the HEW interim provision effectuated the entirely reasonable conclusion of what appears to have been an agency cost/benefit analysis: it was so highly probable that the disabilities of totally disabled miners with pneumoconiosis arose, at least in part, from their coal mine work, that requiring individual factual determinations of "disability causation" was unjustified in light of the costs of making such determinations.

B. The "disability causation" rebuttal test at § 727.203 (b)(3) of the DOL interim regulation violates the "not . . . more restrictive" mandate in Section 402(f)(2). This Court's decision in *Sebben* and the Secretary of Labor's own interpretations of the statute in his regulations foreclose any argument that the word "criteria" in Section 402(f)(2) excludes the "disability causation" criterion. Indeed, the Director did not argue otherwise below but instead contended erroneously that other provisions of the Act or "directives" in the legislative history "justified" his "departure" from Section 402(f)(2)'s mandate. Similarly, the court of appeals, relying principally on the "purpose" provision of the Act at Section 401(a), 30 U.S.C. § 901(a), incorrectly rejected our reading of Section 402(f)(2).

1. The Director argued below that his departure from Section 402(f)(2)'s mandate is justified by a direction in a committee report for him to consider "all relevant medical evidence" in adjudicating claims and by a similar clause in Section 413(b) of the Act, 30 U.S.C. § 923(b). The Director, however, has confused the word "evidence" with the word "criteria," which also appears in the passage from the committee report. Properly read, the "all relevant medical evidence" passage in the committee report does not even suggest, much less require, that he adjudicate claims using additional "criteria" that are more restrictive than the criteria of the HEW interim provision.

2. The Director also argued below that the presumptions at Section 411(c) of the Act, 30 U.S.C. § 921(c)(1)-(5), require that any presumption the Director applies to Section 402(f)(2) claims be fully rebuttable. However, by their terms, the presumptions at Sections 411(c)(3) and 411(c)(4) are themselves irrebuttable and partially rebuttable, respectively. Properly understood, the Director's argument is that Section 402(f)(2) should be read to prohibit the Secretary of Labor from applying presumptions to Section 402(f)(2) claims that differ in any respects from the presumptions in Section 411(c). If accepted, however, such an argument would completely subvert the outcome Congress wanted when it enacted Section 402(f)(2).

3. The court of appeals treated as "outcome determinative" its view that our reading of Section 402(f)(2) contradicts the stated "purpose" of the Act, set forth in Section 401(a), to provide benefits to coal miners who are totally disabled due to pneumoconiosis. However, Section 402(f)(2), enacted nine years after Congress established the black lung benefits program and wrote Section 401(a), was part of a congressional compromise that resolved a legislative struggle between coal miners and the industry. The outcome Congress wanted in enacting Section 402(f)(2), the provision the miners won in the compromise, was, for a temporary period, to assure the continued liberality of black lung awards and to bring the standards applied to Part C claims into parity with the standards applied to Part B claims. Significantly, the court of appeals overlooked these facts and the text of Section 402(f)(2) itself in arriving at its erroneous "outcome determinative" reliance on the "purpose" of the Act at Section 401(a). For the decisions of this Court teach unflagging respect for the texts of statutory provisions that incorporate congressional compromises, even compromises in which the statutory texts dictate results that do not square with the "purposes" of the enactments that include the compromise provisions. *E.g. Board of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). Indeed, here the court of appeals' failure to respect the text of Section 402(f)(2) led it to a result that would defeat the very outcome Congress sought in enacting that provision. The court of appeals' view that there is a conflict between Section 402(f)(2), as we read it, and Section 401(a) is, in any event, without merit, in part because Section 401(a) contains no operative requirements at all, much less any "disability causation" requirement. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18-27 (1981).

C. A coal operator who shows under Section 422(c) of the Act, 30 U.S.C. 932(c), that its mines did not cause

the disability of the miner, thereby shifts liability to the Black Lung Disability Trust Fund for payment of benefits to a claimant who prevails under Section 402(f)(2) and the HEW interim provision.

D. The opportunity that Section 422(c) affords a coal operator to prove that its mines did not cause the disability of the miner is an even broader opportunity than the one Bethenergy incorrectly says would be unconstitutionally absent from the statutory scheme if Section 402(f)(2) were read as we say it must be. Section 422(c) is therefore a complete answer to the due process challenge Bethenergy raises to Section 402(f)(2) as we read it. Moreover, even if the Act lacked a provision like Section 422(c), this Court's decision in *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1 (1976) would establish that Section 402(f)(2), as we read it, is constitutional.

ARGUMENT

Pittston Coal Group v. Sebben, 488 U.S. 105, 113-16 (1988), teaches that the "not . . . more restrictive" mandate in Section 402(f)(2) of the Act means that the "criteria" the Secretary of Labor is to apply under § 727.203 must be at least as favorable to the individual black lung claimant as the "criteria" of the HEW interim provision at § 410.490. The questions here, left open in *Sebben*, are: (1) whether any *rebuttal* provision of the DOL interim regulation at § 727.203(b) is inconsistent with Section 402(f)(2); and (2) if any rebuttal provision is invalid, whether applying the resulting eligibility scheme violates the due process rights of coal companies. *Id.* at 119.[10]

[10] In *Sebben* the Secretary of Labor, after acknowledging that the DOL interim regulation *did* include rebuttal methods not set forth in the HEW interim provision, Reply Brief for the Federal Petitioners at 5, argued that "there is *no basis* for drawing a line

(Footnote continued on following page)

I. SECTION 402(f)(2) OF THE ACT PROHIBITS THE DIRECTOR FROM APPLYING THE DOL REBUTTAL TEST AT § 727.203(b)(3) TO CLAIMS THAT MEET THE INVOCATION REQUIREMENTS OF THE HEW INTERIM PROVISION.

A. The DOL Interim Regulation's "Disability Causation" Rebuttal Test At § 727.203(b)(3) Is A More Restrictive Criterion Than The Criteria In The HEW Interim Provision.

Both the HEW interim provision and the DOL interim regulation include rebuttal tests. §§ 410.490(c), 727.203(b). All the rebuttal tests in the two provisions enumerate ways that the presumptions of eligibility that the respective provisions provide, once invoked, may be defeated. *Sebben*, 488 U.S. at 109; *Mullins Coal Co. v. Director, O.W.C.P.*, 484 U.S. 135, 143-44, 154 (1987).

The first two rebuttal tests of the DOL interim regulation, §§ 727.203(b)(1) and (b)(2), are substantially the same as, and thus do not set forth more restrictive criteria than, the only two rebuttal tests of the HEW interim provision, §§ 410.490(c)(1) and (c)(2). And although the DOL interim rebuttal test at § 727.203(b)(4) lacks a discrete companion test in the HEW interim provision, it does not set forth more restrictive criteria than those in the HEW interim provision with respect to x-ray cases like Mrs. Pauley's. The rebuttal test at § 727.203(b)(4) permits the claimant's opponent to defeat the claim by proving that "the miner does not, or did not, have pneumoconiosis." § 727.203(b)(4).

[10] *continued*
that permits alteration of the rebuttal provisions [of the HEW interim provision], but not the affirmative [*i.e.*, invocation] factors . . . ." *Sebben*, 488 U.S. at 119 (emphasis added). When *Sebben* held that the Secretary's "alteration" of one of the invocation factors of the HEW interim provision *did* violate Section 402(f)(2), the Director's position in that case became a concession of the questions presented here. The Secretary, however, has backed away from this concession in these consolidated cases.

But this Court recognized in *Mullins*, 484 U.S. at 151 and n. 26, that § 727.203(b)(4) is not available in x-ray cases because to invoke the DOL interim regulation by x-ray, biopsy, or autopsy evidence under § 727.203(a)(1), the claimant must prove affirmatively, based on all such evidence, that he does have pneumoconiosis. § 727.203(a)(1). The same result obtains under the HEW interim provision in x-ray cases since § 410.490(b)(1)(i) is identical to § 727.203(a)(1). *See Mullins*, 484 U.S. at 154-55 and n. 27.

The DOL rebuttal test at § 727.203(b)(3), which also lacks a discrete companion test in the HEW interim provision, works differently than § 727.203(b)(4). Except for the court below, the four courts of appeals that have addressed the issue, as well as the Benefits Review Board, have agreed with us that § 727.203(b)(3) *does* set forth a "criteri[on]" that is more restrictive than those in HEW interim provision because § 727.203(b)(3) permits a claimant's opponent to defeat the claim in a way the HEW interim presumption does not. *Compare* cases cited in Petition at 20 *with* P. App. 17. Both interim provisions provide that a claimant who satisfies the requirements of their respective invocation subsections will, *inter alia*, "be presumed to be totally disabled *due to* pneumoconiosis." §§ 410.490(b), 727.203(a) (emphasis added). Both interim provisions therefore confer the presumption that the miner's disability "arises out of coal mine employment" (*i.e.*, "disability causation"). *See* n. 5 *supra* (explaining that, under Act and regulations, the term "pneumoconiosis" includes all respiratory or pulmonary impairments arising out of coal mine employment). Under the DOL interim regulation, the test at § 727.203(b)(3) allows this presumption of "disability causation" to be rebutted. In contrast, the HEW interim provision contains no provision, either in its invocation subsection, § 410.490(b), or in the rebuttal subsection, § 410.490(c), that directs any factual

inquiry concerning "disability causation."[11] "Disability causation" is conclusively presumed under the HEW interim provision.[12]

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[11] The dissenters in *Sebben* believed that § 410.490(b)(3) pertains to "disability causation" and contains a "scrivener's error" that should be corrected so that the section applies to x-ray cases like Mrs. Pauley's, not to ventilatory study cases, to which the express terms of the section say it applies. *Sebben*, 488 U.S. at 128-30 (Stevens, J., dissenting). The majority, however, rejected this "scrivener's error" formulation, *id.* at 119-20; and it is the majority's "construction . . . that becomes a part of the law." *Lorance v. AT & T Technologies*, 109 S.Ct. 2261, 2269 (1989) (Stevens, J., concurring). In any event, to the extent § 410.490(b)(3) addresses "disability causation," it does not set forth a "disability causation" factual inquiry but provides that "disability causation" is "presumed" for miners who worked in the mines at least ten years.

The dissent premised its "scrivener's error" formulation on its assumption that HEW, among others, must have intended that § 410.490(b)(3)'s ten-year mining duration requirement for claimants apply to x-ray cases, which would not otherwise have been subject to any mining duration requirement, rather than to ventilatory study cases, which were already subject to the 15-year mining duration requirement at § 410.490(b)(1)(ii). *Id.* at 130. The dissent's assumption conflicts with HEW's contemporaneous interpretation of its interim provision embodied in Part IV of its Coal Miner's Benefits Manual. *See* Manual at § IB6(d) (paralleling in part § 410.490(b)(3) and indicating that § 410.490(b)(3)'s ten-year mining duration requirement applies only to ventilatory study cases); *see also* Manual at § 1B6(c)(1)(B) (paralleling § 410.490(b)(1)(ii)). The Manual deserves substantial deference. *See* p. 27 *infra*. The source of the ten-year requirement for ventilatory study cases appears to be § 410.414(b)(4) of HEW's permanent regulations. *See* Manual at § IB6(d) (citing § IB3(b), which parallels § 410.414 in part); *see also* 37 Fed. Reg. 18013 (1972) (proposed version of § 410.490(b)(3), citing § 410.414(b)); S. Rep. No. 743, 92d Cong., 2d Sess. 13 (1972) (congressional directive that § 410.414(b)(4) effectuates).

[12] In x-ray cases, the HEW interim provision thus requires the claimant to provide affirmative proof that he has "pneumoconiosis," § 410.490(b)(1)(i), accompanied by affirmative proof that it arose out of coal mining (or that he mined for at least 10 years), § 410.490(b)(2) (citing §§ 410.416, 410.456), and allows the opponent to defeat the claim by showing that the claimant's afflictions are not severe enough to be totally disabling. §§ 410.490(c)(1), (c)(2). That the

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The only court ever to disagree is the court below. The Court observed that §§ 410.490(c)(1) and (c)(2) of the HEW interim provision parenthetically cite § 410.412(a)(1), which, the court said, "refers to a miner being 'totally disabled due to pneumoconiosis.' " P. App. 17. On this basis, it held that these parenthetical citations to § 410.412(a)(1) implicitly incorporated into the HEW interim provision a "disability causation" rebuttal test like the one at § 727.203(b)(3) of the DOL interim regulation. *Id.*

Every authoritative source guiding the search for the meaning of legal texts contradicts the court of appeals' holding.

1. The Text Of The HEW Interim Provision. The parenthetical citations to § 410.412(a)(1) in the HEW rebuttal provisions refer to the definition of "comparable and gainful work," the term-of-art that immediately precedes the citation. Subsection 410.412(a)(1) sets forth the definition of "comparable and gainful work": "*gainful* work in the immediate area of his [the miner's] residence requiring the skills and abilities *comparable* to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, '*comparable and gainful work*' . . .) . . . ." § 410.412(a)(1) (emphasis added). Because this definition is neither intuitively obvious nor set forth elsewhere in § 410.490, the citations to § 410.412(a)(1)'s definition of "comparable and gainful work" provide the clarification of §§ 410.490(c)(1) and (c)(2) that the drafters of § 410.490 reasonably believed they had an obligation to provide.

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[12] *continued*
HEW interim provision affords eligibility to miners who thereby invoke the presumption and withstand rebuttal without an inquiry into "disability causation" means only that, in any individual case, there will be no occasion to determine *whether or not* the miner's pneumoconiosis in fact contributed to his disability.

The court below believed that the parenthetical citations to § 410.412(a)(1) in the two HEW rebuttal provisions refer to a different aspect of § 410.412(a)(1), the "disability causation" component of "total disability."[13] But §§ 410.490(c)(1) and (c)(2) have substantive texts as well as the parenthetical citations, and their substantive texts, which the court completely ignored, both address only the "disability severity" component of the definition of "total disability" at § 410.412, not the "disability causation" or "disability duration" aspect of that definition. *See* n. 13 *supra*. Thus, the natural reading of the parenthetical citations to § 410.412(a)(1) in §§ 410.490(c)(1) and (c)(2) is that they refer only to the definition of "comparable and gainful work" since that definition alone explains and clarifies the "disability severity" component of the term "total disability," the only component that the substantive texts of §§ 410.490(c)(1) and (c)(2) themselves address.

Reading the parenthetical citations to § 410.412(a)(1) in the HEW rebuttal provisions to refer only to the definition of the term "comparable and gainful work" also harmonizes these citations with citations in other regulatory sections. Besides the citations in the HEW rebuttal provisions, one section of HEW's permanent regulations, § 410.426(a), and three sections of DOL's regulations, §§ 727.203(b)(1), 727.203(b)(2) and 727.205(b), also contain parenthetical citations to § 410.412(a)(1). As in the two HEW interim rebuttal provisions, the citations to § 410.412(a)(1)

[13] As we explain more fully in § I.B *infra*, this Court's definition of "total disability," like the statutory definition at Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A), expressly includes two components: (1) that the miner's afflictions be severe enough that he is unable to perform "comparable and gainful work" ("disability severity"); and (2) that he is disabled because of pneumoconiosis ("disability causation"). *Sebben*, 488 U.S. at 114. The regulatory definition of "total disability" at § 410.412 adds a third component, which specifies how long a miner must be disabled ("disability duration"). § 410.412(a)(2).

in all of these other provisions appear immediately after the term "comparable and gainful work." And although the citations to § 410.412(a)(1) otherwise arise in varying contexts in the sections, none is compatible with the conclusion that it might also refer to the "disability causation" aspect of § 410.412.[14] In contrast, six other sections of the regulations—§§ 410.410(c), 410.414(b), § 410.422(c), 410.424(a), 410.432(a), and 410.454(b))—refer to the *entirety* of § 410.412, which sets forth the full, three-component definition of "total disability," not merely the definition of the "disability severity" component ("comparable and gainful work"). In all six of these sections, the citation to § 410.412 appears with, and necessarily refers to, the

[14] Reading the citations to § 410.412(a)(1) in the HEW rebuttal provisions to refer to "disability causation" thus would make hash of the identical citations to § 410.412(a)(1) in §§ 727.203(b)(1) and (b)(2) of the DOL interim regulation, the companion provisions to §§ 410.490(c)(1) and (c)(2). This is because the Secretary of Labor set forth an express and distinct "disability causation" test at § 727.203(b)(3) of the DOL interim regulation, an unnecessary exercise if the citations to § 410.412(a)(1) in §§ 727.203(b)(1) and (b)(2) were themselves meant to set forth such a test. Indeed, the Director himself acknowledged in the court below that the citations to § 410.412(a)(1) in §§ 727.203(b)(1) and (b)(2) do not refer to "disability causation" but refer only to the definition of "comparable and gainful work." Brief of the Federal Respondent at 19 n. 9, *Bethenergy Mines, Inc. v. Director, O.W.C.P. and Pauley*, P. App. 1 [hereinafter *Dir. 3d Cir. Br.*] The case law required that concession. *E.g., Oravitz v. Director, O.W.C.P.*, 843 F. 2d 738, 739-40 (3d Cir. 1988) (citing cases).

In § 410.426(a), the citation to § 410.412(a)(1) cannot be read to refer to the "disability causation" aspect of § 410.412 because the sentence immediately *after* the parenthetical citation to § 410.412(a)(1), to which the parenthetical citation cannot refer, sets forth the "disability causation" requirement for cases adjudicated under the HEW permanent regulations. § 410.426(a)(1).

In § 727.205(b), the citation to § 410.412(a)(1) cannot be read to refer to the "disability causation" aspect of § 410.412 because, among other reasons, the entire 66-word text of the subsection addresses only the level of severity of deceased miners' afflictions before their deaths. § 727.205(b).

term "total disability" or "totally disabled." Thus, the regulations consistently cite § 410.412*(a)(1)* to refer only to the definition of the term-of-art "comparable and gainful work" and consistently cite § 410.412 *in its entirety* to refer to components of "total disability" other than, or in addition to, the "disability severity" component.

Moreover, it is difficult to understand why, if HEW meant to incorporate a "disability causation" inquiry into its interim provision, it would have chosen to do so through cryptic cross-references rather than delineating such an inquiry separately, especially since HEW did just that in the permanent Part 410 regulations that it promulgated simultaneously with the HEW interim provision. § 410.426(a). In addition, that HEW inserted identical parenthetical citations to § 410.412(a)(1) both in § 410.490(c)(1) and in § 410.490(c)(2) conflicts with the court's conclusion that the citation incorporated a *single* "disability causation" rebuttal test. *See* P. App. 17. Finally, applying a "disability causation" test to the claims of miners described in § 410.490(c)(1) makes no sense because such miners must still be performing their usual coal mine work or comparable and gainful work and therefore lack the functional "disability" as to which any "causation" could be determined.

2. HEW's Contemporaneous Interpretation of Its Interim Provision. On October 17, 1972, less than three weeks after HEW's interim provision became effective as a regulation, 37 Fed. Reg. 20634 (1972), HEW supplemented Part IV of its existing Coal Miner's Benefits Manual (the "Manual").[15] That supplement set forth in detail HEW's understanding of its interim provision, including the requirements for invoking and for rebutting it. Manual at § IB6. The Manual nowhere suggests that the interim provision allows, much less requires, any "disability causation" factual inquiry. In particular, the section of the Manual that parallels the two HEW interim rebuttal tests does *not* include a cross-reference to any regulatory or Manual provision pertaining to "disability causation." Manual at § IB6(e).[16] As a contemporaneous and detailed interpretation of its own interim regulation, HEW's Manual "deserves substantial deference" because it is not "plainly erroneous or inconsistent with the regulation." *Mullins*, 484 U.S. at 159 (citation omitted).[17]

[15] We have lodged a copy of the Manual with the Clerk of this Court and served copies upon all other parties in these consolidated cases.

[16] The only cross-reference accompanying the section of the Manual paralleling the two HEW rebuttal tests is to "subsection IB9(g)(1) of TI #21." That provision of the Manual is in a section dealing with the definition of "comparable and gainful work." This cross-reference in the Manual strongly supports our reading of the cross-references to § 410.412(a)(1) in the HEW rebuttal provisions themselves. Moreover, the Manual supplements the two rebuttal tests enumerated in the text of the HEW interim provision with an additional rebuttal test that is not enumerated in the text of the provision—that the presumption will be rebutted "if [b]iopsy or autopsy findings clearly establish that no pneumoconiosis exists." Manual § IB6(e)(3). That the Manual added only this rebuttal test further emphasizes the absence of a "disability causation" rebuttal test or other "disability causation" inquiry in the HEW interim provision.

[17] DOL's recent contrary interpretation of HEW's interim provision is not entitled to any deference. As a regulatory provision, § 410.490 was HEW's rule, so that HEW, not DOL, is the agency to whom any deference is owing. *Mullins*, 484 U.S. at 159. To be sure, Congress elevated the HEW interim provision to statutory status when it enacted Section 402(f)(2). *See* p. 39 *infra*. However, DOL's interpretation of the HEW interim provision as a statutory provision is not entitled to any deference because the provision is not "silent or ambiguous" with respect to its exclusion of a "disability causation" factual inquiry. *Chevron, USA v. Natural Resources Defense Council*, 476 U.S. 837, 843 and n. 9 (1984). The text of the HEW interim provision makes this clear, *see*, § I.A.1 *supra*; and this conclusion is only reinforced by the interpretations of it in the case law, *see* § I.A.3 *infra*, and that HEW

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3. Judicial Interpretations of the HEW Interim Provision. Over 400,000 claims have been adjudicated under the HEW interim provision. *1976 Annual Report*, p. 8 *supra* at 4; 1978 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act 21 (1979). And these adjudications have produced hundreds, if not thousands, of published decisions involving x-ray cases. Yet neither the Director nor Bethenergy has cited, and we are unaware of, any such decision, other than the decision below, in which any adjudicator, at any administrative or judicial level, construed the HEW interim provision to permit a "disability causation" factual inquiry. To the contrary, the federal court cases reviewing the administrative decisions of HEW uniformly interpreted the HEW interim provision to include only the two rebuttal tests at §§ 410.490(c)(1) and (c)(2) and did not read either of them or any other part of the HEW interim provision to entail a "disability causation" inquiry. *E.g.*, *Haywood v. Secretary of Health and Human Services*, 699 F.2d 277, 285 (6th Cir. 1983).

4. The Circumstances Attending Adoption of the HEW Interim Provision. The HEW officials charged with administering the black lung program and with drafting the HEW interim provision believed that the task of determining medically whether a miner's disability arose out of his coal mine employment was "virtually impossible." *1972 Comptroller General's Report*, p. 3 *supra* at 31.

[17] *continued*
set forth in its Manual, *see* § I.A.2 *supra*, all of which Congress is presumed to have been aware when it elevated the HEW interim presumption to statutory status. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *Director, O.W.C.P. v. Perini North River Assoc.*, 459 U.S. 297, 319-20 (1983) (law that Congress is presumed to know includes judicial decisions).

Indeed, the agency found such determinations so difficult that, even before it promulgated the HEW interim provision, it had established a policy of awarding benefits, without making a "disability causation" determination, to disabled claimants who had coal workers' pneumoconiosis and one or more other conditions. *Id.* at 33.[18] Nonetheless, the time it took physicians to make such determinations and then for adjudicators to resolve conflicting determinations contributed greatly to the backlog of claims that Congress had found so objectionable and had said it wanted eliminated. *1972 Comptroller General's Report*, p. 3 *supra* at 2; *see also* S. Rep. No. 743, 92d Cong., 2d Sess. 18 (1972). At the same time, HEW "could reasonably have concluded that it is highly probable that a person who engaged in coal mine employment for over a decade [like Mr. Pauley] is totally disabled as a result of pneumoconiosis arising from that employment if he or she can prove," *inter alia*, that he or she has pneumoconiosis shown by x-ray, biopsy or autopsy evidence. *Mullins*, 484 U.S. at 157 (stating what Congress could "reasonably have concluded" on the basis of the evidence before it). In this context, the omission of a "disability causation" factual inquiry under the HEW interim provision effectuated the entirely reasonable conclusion of what appears to have been an agency cost/benefit analysis: it was so "highly probable" that totally disabled miners with pneumoconiosis were disabled, at least in part, as a result of their coal mine work, that requiring individual factual determinations of "disability causation" was unjustified in light of (a) the evidence that making such determinations at all was "virtually impossible," (b) the evidence that making

[18] If HEW had adjudicated Mr. Pauley's claim and applied such a policy, it would have awarded him benefits. Besides the medical pneumoconiosis that his x-rays revealed, Mr. Pauley had other respiratory conditions, such as emphysema and chronic bronchitis, as well as non-respiratory conditions, such as arthritis. P. App. 28-35, 37-38.

such determinations would significantly delay the processing of claims, and (c) the fact that Congress had directed the agency to ensure the "prompt and vigorous processing of the large backlog of claims." § 410.490(a).

B. The "Disability Causation" Rebuttal Test At § 727.203(b)(3) Violates Section 402(f)(2) Of The Act.

1. "Disability Causation" Is Among The "Criteria" That Section 402(f)(2) Encompasses.

If this Court accepts our position that the "disability causation" test in § 727.203(b)(3) is more restrictive than the criteria the HEW interim provision sets forth, *see* § I.A. *supra*, then the statutory question here turns, as it did in *Sebben*, on *which* "criteria" Section 402(f)(2) encompasses. *Sebben*, 488 U.S. at 113-18. Our position is that the "criteria" that Section 402(f)(2) encompasses do include the "disability causation" criterion.

In *Sebben* this Court rejected the Director's contention that the word "criteria" in Section 402(f)(2) did not encompass the "disease causation" criterion at issue there but encompassed only other "medical criteria." *Sebben*, 488 U.S. at 115-18. The Court first referred to the text of Section 402(f)(2) itself, observing that the term "criteria" is "unqualified" both in Section 402(f)(2) and in Section 402(f)(1)(C), whereas in the intervening provision, Section 402(f)(1)(D), the term is qualified. *Id.* at 115-16 and n. 2. The Court concluded that "there is no apparent reason for giving the unqualified word 'criteria' the unnaturally limited meaning the Secretary suggests." *Id.* at 116.[19]

[19] The dissent in *Sebben* agreed with the Secretary and the industry that the word "criteria" in Section 402(f)(2) meant only "medical criteria," basing its view largely on various references in the legislative history to such expressions as "medical criteria" and "medical standards." *Sebben*, 488 U.S. at 134-46 (Stevens, J., dis-

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The *Sebben* Court's analysis, emphasizing that Congress chose not to "qualify" the word "criteria" in Section 402(f)(2) in any way, suggests that the word should be broadly interpreted, its breadth being limited only by the particular "criteria" described in the text of Section 402(f)(2) itself: "the criteria applicable to a claim filed on June 30, 1973." 30 U.S.C. § 902(f)(2). Such "criteria" encompass all criteria of the HEW interim provision, including its conclusive presumption of "disability causation."

Strongly supporting this broad interpretation of the word "criteria" in Section 402(f)(2) is Congress' "motive" in enacting Section 402(f)(2): "to assure the continued liberality of black lung awards." *Sebben*, 488 U.S. at 116. As we have explained, one important aspect of this outcome that Congress wanted was that Part C claims should be adjudicated under standards as liberal as those applied to Part B claims—*i.e.*, under the standards of the HEW interim provision. *See* pp. 10-12 *supra*. Given this result-oriented "motive," it is difficult to discern here, as it was in *Sebben*, any reason why Congress would have wanted to limit "unnaturally" the ambit of the term "criteria" in Section 402(f)(2) to exclude any criteria that might make a difference in the claims approval rate for Part C claims, *Sebben*, 488 U.S. at 116, including the "disability causation" criterion.

That Congress placed Section 402(f)(2) in Section 402(f), the section defining "total disability," prompted the Secre-

[19] *continued*

senting). However, the dissent did not address the evidence establishing that, because of an eligibility/processing dichotomy in the regulations, such expressions were actually terms-of-art that meant all criteria necessary to establish eligibility, not merely medical criteria. *See* Brief for Charlie Broyles and Lisa Kay Colley in *Sebben* at 21-39 (discussing this and other factors contradicting the conclusion that the "criteria" that Section 402(f)(2) includes are strictly medical criteria).

tary to argue in *Sebben* that the "criteria" in Section 402(f)(2) are limited to the criteria pertaining to "total disability." *Sebben*, 488 U.S. at 114. Significantly, this Court observed in *Sebben* that "total disability," a term-of-art, encompasses "disability causation" as well as "disability severity" criteria. *Id.* ("total disability [is] defined as the inability of the claimant to do his former coal mine work or the equivalent *because of pneumoconiosis*") (emphasis added). The Court's definition of "total disability" is consistent with the statutory definition at Section 402(f)(1)(A), 30 U.S.C. § 902(f)(1)(A), and with HEW's and DOL's regulatory definitions at §§ 410.412 and 718.204(b), respectively, in that all four definitions of the term "total disability" expressly subsume the "disability causation" criterion.[20] Thus, the court below, which, like the Secretary in *Sebben*, believed that the word "criteria" in Section 402(f)(2) means "total disability" criteria, P. App. 17, erred in holding that the DOL interim regulation's "disability causation" test at § 727.203(b)(3) is not a "total disability" criterion that Section 402(f)(2) prohibits the Secretary from applying to claims subject to the section. *Id.*[21]

Much as in *Sebben*, this Court need not choose between these two interpretations of the word "criteria" in Section

[20] Indeed, the Director conceded below that HEW's regulatory definition of "total disability, by subsuming "disability causation," effectuates Congress' statutory definition of "total disability." *Dir. 3d Cir. Br.*, n 14 *supra* at 18-19 and n. 8.

[21] The Court below also held that the word "criteria" in Section 402(f)(2) does not include rebuttal criteria at all. P. App. 17. That holding is plainly wrong. Section 402(f)(2) contains not a hint suggesting that whether the word "criteria" in the section encompasses a particular substantive criterion in the HEW interim provision should turn on whether the substantive criterion happens to appear in the invocation, rather than in the rebuttal, subsection of that provision. *See Bean v. Director, O.W.C.P.*, 14 Black Lung Rep. 1-7 (BRB 1989).

402(f)(2)—all criteria addressed in the HEW interim provision, on the one hand, or "total disability" criteria, on the other.[22] For under both interpretations the word "criteria" in Section 402(f)(2) includes the "disability causation" criterion that is more restrictive under the DOL interim regulation than it is under the HEW interim provision.[23] Indeed, the construction of Section 402(f)(2) that the Director made contemporaneously with its enactment

[22] The *Sebben* court found it unnecessary to pass on the Secretary's argument that the word "criteria" in Section 402(f)(2) means "total disability" criteria. *Sebben*, 488 U.S. at 114. The Court, however, did characterize it as having "considerable merit, though . . . by no means [being] free from doubt." *Id.* One important factor substantiating the doubt the Court expressed is that, while Congress placed Section 402(f)(2) in the same *section* of the statute as the provisions defining "total disability," Congress did not place it in the same *subsection*. 30 U.S.C. § 902(f). Indeed, Section 402(f)(2) does not even contain the term "total disability," much less textual language telling the reader that it is defining the term "total disability." 30 U.S.C. § 902(f)(2).

[23] The result would be the same even if the word "criteria" in Section 402(f)(2) could somehow be read—we know not on what basis—to encompass only "disability severity" criteria, a subset of "total disability" criteria. The Court held in *Sebben* that a particular requirement of the DOL interim regulation that "bears *proximately* upon" one criterion violates Section 402(f)(2) of the Act if such requirement "bears *ultimately* upon" some other criterion that the word "criteria" in Section 402(f)(2) encompasses. *Sebben*, 488 U.S.at 114 (emphasis in text). The "disability causation" requirement at § 727.203(b)(3) of the DOL interim regulation "bears ultimately" on the "disability severity" component of the term "total disability." A hypothetical makes the point. Suppose that instead of setting forth the "disability causation" inquiry as a *rebuttal* test, as DOL did in its interim regulation, it had set forth the "disability causation" inquiry as an *invocation* requirement. If DOL had done that, this case would be on all fours with *Sebben*, except that instead of the more restrictive "disease causation" criterion that blocked access to a presumption of eligibility in *Sebben*, 488 U.S. at 114, we would have a more restrictive "disability causation" criterion blocking such access here. As we discussed at n. 21 *supra*, that the "more restrictive" criterion appears at the rebuttal, rather than at the invocation, stage cannot make a difference for purposes of Section 402(f)(2) analysis.

was that the word "criteria" in the section includes "disability causation." § 727.200 (construing the word "criteria" in Section 402(f)(2) to mean "the criteria for determining whether a miner is or was totally disabled . . . *due to* pneumoconiosis") (emphasis added); *see also* § 718.1(b).[24] Consistently, the Director did not argue otherwise below.

2. No Provision of the Act Authorizes The Director To Depart From The Mandate Of Section 402(f)(2).

Rather than challenge Mrs. Pauley's position that the word "criteria" in Section 402(f)(2) encompasses the "disability causation" criterion, the Director argued below that various provisions elsewhere in the Act justified his "departure" from the "[not] . . . more restrictive rule" of Section 402(f)(2) itself. *Dir. 3d Cir. Br.*, n. 14 *supra* at 22-25. And the court below believed that the purpose of the Act set forth in Section 401(a), 30 U.S.C. § 901(a), required the outcome the court reached. P. App. 12-13. Both the Director and the court of appeals were wrong.

a. "All Relevant Evidence." The Director relied heavily in the court of appeals on a passage in the conference committee's report accompanying the 1978 amendments, which stated:

> With respect to a claim filed or pending prior to the promulgation of such regulations, such regulations shall not provide *more restrictive criteria* than those applicable to a claim filed on June 30, 1973, except that in determining claims *under such criteria all relevant medical evidence* shall be considered.

[24] By adding the "disability causation" test at § 727.203(b)(3), however, the DOL interim regulation at § 727.203—the Director's *implementation* of Section 402(f)(2)—failed to honor his contemporaneous *construction* of Section 402(f)(2) at § 727.200. *See* § I.A *supra*.

H.R. Rep. No. 864, 95th Cong., 2d Sess. 16 (1978) (emphasis added). The Director suggested that the second sentence of Section 413(b), 30 U.S.C. § 923(b), codified the committee's wish that the Secretary of Labor consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims. *Dir. 3d Cir. Br.*, n. 14 *supra* at 23 n. 11. He argued that to be faithful to the "directive" to consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims, the Secretary of Labor had to include a "disability causation" factual inquiry in the DOL interim regulation because not doing so "would eliminate consideration of a great deal of [medical] evidence relevant to determining whether a miner was totally disabled due to pneumoconiosis," such as medical evidence "about smoking, heart ailments, or respiratory impairments unrelated to coal mine employment." *Id.* at 23.

The Director's reliance on the "all relevant medical evidence" clause in the committee report found support in a Sixth Circuit decision, *Youghiogheny and Ohio Coal Co. v. Milliken*, 866 F.2d 195, 202 and n. 3 (6th Cir. 1989). But the argument is without merit, and the Sixth Circuit itself has now questioned that decision. *See Neace v. Director, O.W.C.P.*, 877 F. 2d 495, 496 (6th Cir.), *modifying* 867 F. 2d 264 (6th Cir. 1989).

First, the conference committee's wish that the Secretary of Labor consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims was not codified in the second sentence of Section 413(b) of the Act or in any other provision. Indeed, the latter provision was enacted in 1972, Black Lung Benefits Act of 1972, Pub.L. No. 92-303, § 4(f), 86 Stat. 154 (1972), several years *before* the 1977 conference committee report and the enactment of Section 402(f)(2). Consequently, regardless of what the conference committee wished respecting the consideration of "all relevant medical evidence," its wish never found ex-

pression in the statute itself and so is not one that this Court need or should honor. *See T.V.A. v. Hill*, 437 U.S. 153, 191 (1978).

More importantly, the Director's "all relevant medical evidence" argument simply confuses the committee's reference to "all relevant medical evidence" with its two references to "criteria." The term "criteria" means "standard[s] on which a judgment or decision may be based," the same meaning it has in Section 402(f)(2) of the Act. *Sebben*, 488 U.S. at 113. Accordingly, the passage from the conference report specifies, without qualification, that the Act limits the class of "standards" the Secretary may apply in adjudicating claims to "standards" that are not more restrictive than the "standards" applicable on June 30, 1973. The passage also specifies, again without qualification, that the "evidence" the Secretary is to consider in adjudicating claims "under" the "standards" he has established or will establish in conformity with the Act, must be "all the . . . medical evidence" that is "relevant" to such "standards." Accordingly, the conference report does not express even the committee's wish, much less Congress', that the Secretary be permitted to enlarge the class of "standards" or "criteria" he may apply in adjudicating Section 402(f)(2) claims to include some standards that are more restrictive than the "standards" found in § 410.490 itself. *See* Appendix at 2a, *Peabody Coal Co. v. Taylor*, No. 89-1696 (U.S. petition for cert. filed May 2, 1990) (court of appeals' unpublished order denying rehearing).

The conference committee directed the Secretary of Labor to consider "all relevant medical evidence" in adjudicating Section 402(f)(2) claims in an effort to prevent DOL adjudicators from approving claims upon invocation of the presumption without even considering the evidence pertinent to the rebuttal standards, as some apparently thought the HEW adjudicators had done. *Mullins*, 484

U.S. at 149-50. Neither the committee's direction nor Section 413(b) of the Act authorized the Director to apply the "disability causation" test at § 727.203(b)(3) or any other criteria that Section 402(f)(2) prohibits him from applying.

b. The "General Statutory Scheme." The Director also argued below that he is justified in disregarding Section 402(f)(2)'s mandate because not applying a "disability causation" rebuttal test would "depart from the general statutory scheme." *Dir. 3d Cir. Br.*, n. 14 *supra* at 24-25. This scheme, according to the Director, is one in which the elements of a claim that the statutory presumptions in Section 411(c), 30 U.S.C. § 921(c), presume are, with one exception, always rebuttable. *Dir. 3d Cir. Br.*, n. 14 *supra* at 24.

The "general scheme" that the Director posits does not exist. As he acknowledges, *id.* at 24 and n. 12, Section 411(c)(3)'s presumption that a miner's impairments are "severe" enough to be "totally disabling" is irrebuttable. Similarly, Section 411(c)(5) permits only partial rebuttal of the presumed element of "disability severity." And § 718.306, the Secretary's regulatory implementation of the Section 411(c)(5) statutory presumption, entirely disallows rebuttal of the presumption of "disability causation." § 718.306(c).

The Director's "general scheme" argument is therefore properly understood as a contention that Section 402(f)(2) should be read to prohibit the Secretary of Labor from applying presumptions to Section 402(f)(2) claims that differ in any respects from the presumptions in Section 411(c). But HEW's and DOL's sets of *permanent* regulations at 20 C.F.R. Parts 410 and 718, respectively, independently implement all five of the presumptions codified at Section 411(c) of the Act. §§ 410.416(a), 410.456(a), 718.203(b) (implementing Section 411(c)(1)); §§ 410.462(a),

718.303(a) (implementing Section 411(c)(2)); §§ 410.418, 410.458, 718.304 (implementing Section 411(c)(3)); §§ 410.414 (b)(1)-(3), 410.454(b)(1)-(3), 718.305(a) (implementing Section 411(c)(4)); §§ 410.702(g), 718.306(a)-(c) (implementing Section 411(c)(5)). And the Director must, in any event, apply these and all other permanent regulations to claims that do not succeed under the interim provisions. §§ 410.490(e), 727.203(c), (d). Accordingly, the Director's "general scheme" argument imposes a reading on Section 402(f)(2) that would completely subvert the outcome Congress wanted when it enacted Section 402(f)(2): to ensure that the claims to be adjudicated under that provision would *not* be relegated solely to the strict permanent regulations but would first be adjudicated under standards no more restrictive than the much more liberal HEW interim provision. *See Sebben*, 488 U.S. at 117.

c. The "Purpose" of The Benefits Act and "Justice." In rejecting our contention that the DOL "disability causation" rebuttal test at § 727.203(b)(3) violated Section 402(f)(2), the court of appeals relied principally on the "purpose of the Benefits Act" as set forth in Section 401(a). P. App. 12-13. The court described this purpose as "provid[ing] a recovery for a miner totally disabled at least in part by pneumoconiosis *if the disability arises out of coal mine employment.*" *Id.* at 12. The court then concluded that "it seems perfectly evident that . . . [no] claimant who [does not show or allow his opponent to disprove that his disability arose in part out of coal mine employment] may nevertheless recover." *Id.* at 13. That conclusion in turn was, as the court stated, "outcome determinative" of its alternative holdings, *id.* at 12, which, as we have explained, are incorrect on their own terms. *See* pp. 23-30 and 31-32 and n. 21 *supra*.

The court's view of the purpose of the Act and the decisive ("outcome determinative") force the court gave that

view were erroneous for four reasons. First, part of the court of appeals' "outcome determinative" answer was that every "set of *regulations*" must conform to the statutory "disability causation" requirement that, in the court's view, Section 401(a) imposes. P. App. 13 (emphasis added). That answer obviously assumed that the HEW interim provision, on which we relied in urging the court to forbid the Director from applying the "disability causation" rebuttal test at § 727.203(b)(3), is merely a regulation. However, Congress elevated the HEW interim provision to statutory status when it decreed in Section 402(f)(2) that the HEW interim provision set the *statutory* standard of restrictiveness for the "criteria" the Secretary of Labor could apply. *Sebben*, 488 U.S. at 113-16. Accordingly, the actual question before the court of appeals was, as it is here, whether the rebuttal test at § 727.203(b)(3) of the DOL interim regulation is consistent with Section 402(f)(2) (*i.e.*, the HEW interim provision *as a statute)*, not, as the court of appeals thought, whether the HEW interim provision *as a regulation* is consistent with the statutory "purpose" provision at Section 401(a).

Second, the court of appeals arrived at its "outcome determinative" answer to Mr. Pauley's claim without ever having scrutinized the text of Section 402(f)(2), the statutory provision on which the claim is based, and by misreading the plain language of Section 401(a), the statutory provision at which it did look. *See* P. App. 12-13. Section 402(f)(2)'s "not . . . more restrictive" mandate is an operative requirement that supports our position, *see* § I.B.1 *supra*, whereas Section 401(a) sets forth no operative requirements at all, much less any "disability causation" requirement. Rather, Section 401(a) is merely the type of precatory "purpose" provision typically found in federal benefits and grant-in-aid statutes. *See Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 18-27 (1981).

Third, the disharmony the court of appeals believed the stated purpose of the Act in Section 401(a) has with Section 402(f)(2), as we read it, does not exist. If Section 401(a) establishes a benefits program the purpose of which makes "disability causation" an eligibility requirement, then Section 402(f)(2), as it incorporates the HEW interim provision, does just that. The court of appeals confused the absence of a "disability causation" *factual inquiry* with the absence of a "disability causation" *eligibility requirement*. Like Section 401(a), as the court read it, Section 402(f)(2), through the HEW interim provision, includes a "disability causation" *eligibility requirement*: a claimant who successfully invokes "will be presumed to be totally disabled *due to pneumoconiosis*." § 410.490(b) (emphasis added). The "disability causation" requirement is satisfied conclusively by proving other significant facts that invoke the HEW interim presumption, but it is an eligibility requirement nonetheless.[25]

[25] Nothing in Section 401(a) or any other provision of the Act suggests that Congress meant to prohibit HEW from issuing regulations, like its interim provision, that permitted a miner to meet an element of his claim (*e.g.*, "disability causation") by means of a conclusive presumption invoked by proof of other significant facts. To the contrary, Sections 402(f) and 411(b) of the Act, 30 U.S.C. §§ 902(f), 921(b), gave HEW legislative authority to write regulations governing the eligibility standards for Part B claims. 30 U.S.C. § 902(f) (1970 & Supp. II 1972) ("The term 'total disability' has the meaning given to it by regulations of the Secretary of Health, Education and Welfare . . ."); 30 U.S.C. § 921(b) (1970 & Supp. II 1972) ("The Secretary [of HEW] shall by regulation prescribe standards for determining . . . whether a miner is totally disabled due to pneumoconiosis. . . ."); *see Schweiker v. Gray Panthers*, 453 U.S. 34, 44 (1981). Confirming HEW's authority to permit a miner to establish his eligibility by invoking a conclusive presumption of an element of a claim is that Section 411(d), 30 U.S.C. § 921(d), provides that the breadth of HEW's rulemaking authority was in no way limited by the five presumptions set forth in Section 411(c), including the conclusive presumption at Section 411(c)(3) applicable in "complicated" pneumoconiosis cases. Accord-

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Fourth, the court of appeals' reliance on the "purpose of the . . . Act," P. App. 12, was in error because it simply overlooked the fact that Section 402(f)(2) was compromise legislation that resolved a legislative struggle between coal miners and the industry. *See Sebben*, 488 U.S. at 140 (Stevens, J., dissenting); pp. 10-12 *supra*.[26] This oversight was significant because Bethenergy's plea in this case is ultimately bottomed on a request that this Court give it a favorable result that, as we have shown, Congress declined to give it in the statute itself when codifying the compromise that was forged.

This Court, however, is not in the business of extending judicial favors to legislative combatants that, like the industry here, claim dissatisfaction with the results of leg-

[25] *continued*
ingly, any regulations HEW issued in 1972 "to prescribe [eligibility] standards" for "total disability" were lawful unless they were "arbitrary, capricious, or manifestly contrary to the statute." *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 844 (1984). The HEW interim provision was none of these things. In particular, its conclusive presumption of "disability causation" is properly understood as the product of a reasonable agency cost/benefit analysis that was responsive to Congress' express wishes. *See* pp. 29-30 *supra*.

[26] Although the compromise gave something to both coal miners and the coal industry, the industry appears to have gotten the better of the legislative bargain. Under the Part 718 regulations, which is what the industry won, the overall denial rate has been an astonishing 91.4%, and the denial rate since January 1, 1982 has been 93.5%. 1988 U.S. Dep't of Labor Annual Report on the Administration of the Black Lung Benefits Act 26 (1990) [hereinafter *1988 Annual Report*]. In contrast, the adjudications under the liberal standards that Section 402(f)(2) mandated, which is what the union won, have resulted in only a 42.9% approval rate, *id.*, below the rate the Senate Labor and Public Welfare Committee considered unsatisfactory in 1972. S. Rep. No. 743, 92d Cong., 2d Sess. 3 (1972). Moreover, these adjudications under the liberal Section 402(f)(2) standards are virtually at an end, while adjudications under the strict Part 718 regulations will continue indefinitely. *1988 Annual Report*, *supra* at 26.

islative compromises that statutory texts embody. The primacy of the legal text in construing the meaning of statutes and the respect this Court shows for congressional compromises resolving legislative struggles between or among competing factions forbid such gratuities. *See, e.g., Sebben*, 488 U.S. at 118 ("[W]e . . . sit . . . to apply what Congress enacted. . . ."); *T.V.A. v. Hill*, 437 U.S. 153, 191 (1978) (declining to give effect to unambiguous intent of congressional committees when substantive statute forbade result committees wanted); *Local No. 82, Furniture & Piano Moving Drivers v. Crowley*, 467 U.S. 526, 542, 538-46 (1984) (rejecting contention that provision referring to "already conducted" elections in federal labor statute that "[like] much federal labor legislation . . . was 'the product of conflict and compromise,' " should be read not to denote elections that have been conducted but in which ballots have not been tabulated and certified); *Aluminum Co. v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 383, 390-93 (1984) (rejecting argument by public utilities that provision referring to "amount of power" in federal legislation passed to resolve "consumer struggle" among utilities and others for cheap power should be read also to refer to the "interruptability" of power).

These principles apply even when, unlike here, the express dictates of the text do not square with the ultimate stated "purpose" of the legislation of which the compromise provision is part. *Board of Governors, FRS v. Dimension Fin. Corp.*, 474 U.S. 361, 374 (1986). ("Invocation of the 'plain purpose' of legislation at the expense of the terms of the statute itself takes no account of the processes of compromise and, in the end, prevents the effectuation of congressional intent."); *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective

must be the law") (emphasis omitted); *see Crowley*, 467 U.S. at 538-46; *Block v. Community Nutrition Institute*, 467 U.S. 340, 347 (1984).[27]

The court of appeals also erred in concluding that benefits awards to miners who were, "on the . . . facts," not disabled due to pneumoconiosis would be "unjust." P. App. 14. It is not "unjust" to honor Congressional compromises. *See Mohasco Corp. v. Silver*, 447 U.S. 807, 826 (1980). The industry has already capitalized heavily on what it won under the compromise. *See* n. 26 *supra*. "Justice" demands that, in return for these gains, it pay the compromise price that Congress set.

3. No "Clearly Expressed Legislative Intention" Contrary To The Statutory Language Justifies Any Departure From The Mandate Of Section 402(f)(2).

There is a "strong presumption that Congress expresses its intent through the language it chooses." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n. 12 (1987). That presumption weighs in the black lung claimant's favor here. *See* § I.B.1 *supra*. To overcome it, the Secretary and the industry must show that the meaning the claimants ascribe to the text would lead to an absurd, or at least a highly unusual, result that "other evidence of congressional intent," principally the legislative history, clearly shows that

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[27] Indeed, that the 1978 amendments that added the Section 402(f)(2) compromise provision should even be evaluated in terms of what Congress' "purpose" might or must have been when it passed the Act nine years earlier is, at bottom, illogical. Statutory amendments, especially ones effectuating compromises between or among competing constituencies, have their own purposes, as this Court recognized in *Sebben* with respect to Section 402(f)(2) itself. *Sebben*, 488 U.S. at 116 ("It seems likely that Congress had no particular motive in preserving the HEW interim medical criteria [when it enacted Section 402(f)(2)] other than to assure the continued liberality of black lung awards.").

Congress could not have wanted. *Public Citizen v. U.S. Dep't of Justice*, 109 S. Ct. 2558, 2566 (1989). *Accord INS v. Cardoza-Fonseca*, 480 U.S. at 432 n. 12 (1987).

There is nothing absurd or unusual about awarding black lung benefits in claims like Mr. Pauley's. To the contrary, that the HEW interim provision allowed benefits awards to claimants without a "disability causation" inquiry appears to be the product of an eminently reasonable agency determination that, in light of all the circumstances, the costs of applying a "disability causation" test were too great to allow such a test to be imposed. *See* pp. 29-30 *supra*. Similarly, that Section 402(f)(2), as we read it, forbids a "disability causation" test in the DOL interim regulation is the outcome of a congressional compromise of the type that is usual in the legislative process.

Moreover, far from revealing any intention contrary to the text of the Act, the legislative history affirmatively supports our position. We have found nothing in the legislative history even suggesting, much less "clearly express[ing]," *Cardoza-Fonseca*, 482 U.S. at 432 n. 12, that Congress wanted to allow the Director to supplement the HEW interim provision with a "disability causation" factual inquiry.[28] In contrast, the legislative history clearly

[28] To be sure, a review of the legislative history reveals a decided silence with respect to whether members of Congress were aware or not that the HEW interim provision lacks a "disability causation" test. No legislator spoke to his or her precise understanding of the interstices of the HEW interim provision. However, the inference that most, if not all, legislators were simply unaware of the specific terms of the HEW interim provision, or of the way it had been applied, is impermissible, as this Court "generally presume[s] that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp.*, 486 U.S. at 184-85. The force of that presumption is especially strong where, as with Section 402(f)(2) and the HEW interim provision, the terms of the particular legislation that Congress

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establishes that the outcome Congress wanted in enacting Section 402(f)(2) was to bring the Part C standards into parity with the Part B standards. *See* pp. 10-12 *supra*. Congress could not have achieved that outcome if it had authorized the Secretary of Labor to supplement the HEW interim provision with a "disability causation" factual inquiry, which would have operated to the detriment of claimants.

C. An Individual Coal Operator Who Shows Under Section 422(c) That Its Mines Did Not Cause The Disability Of The Miner, Thereby Shifts Liability To The Black Lung Disability Trust Fund For Payment Of Benefits To A Claimant Who Prevails Under Section 402(f)(2) And The HEW Interim Provision.

With respect to claims adjudicated under Part C of the Act, black lung benefits are paid either by individual coal operators or by the federal Black Lung Disability Trust Fund. 30 U.S.C. §§ 932(b), 932(c), 932(j) (incorporating 26 U.S.C. §§ 9501(d)(1)(B), (d)(2), (d)(7)).[29] The Trust Fund is exclusively liable for the payment of black lung benefits in only three categories of claims, among which are those where "there is no operator who is liable for the payment of such benefits." 26 U.S.C. §§ 9501(d)(1)(B), (d)(2), (d)(7); 30 U.S.C. § 932(j)(1) (incorporating 26 U.S.C. § 9501(d)(1)). Such claims are identified under Section 422(c) of the Act, 30 U.S.C. § 932(c), which allows a coal operator to avoid indi-

[28] *continued*
enacts suggest that "Congress clearly had to focus on the terms of" the existing law. *Aluminum Co.*, 467 U.S. at 392 and n. 8. The inference that this Court's decisions requires is therefore that when Congress enacted Section 402(f)(2), it *was* aware that the HEW interim provision did *not* include a "disability causation" provision.

[29] The Trust Fund is funded by taxes collected from coal producers on the amount of coal they produce, 26 U.S.C. § 4121, and is administered by the Secretaries of the Treasury, of Labor, and of Health and Human Services, as trustees. 26 U.S.C. § 9501(a)(2).

vidual liability to a claimant found eligible for benefits if the operator is able to prove, *inter alia*, that the miner's disability "did not arise, at least in part, out of employment in a mine . . . *when it was operated by such operator.*" 30 U.S.C. § 932(c) (emphasis added). Thus, Section 422(c) allows a "disability causation" factual inquiry that is more favorable to an operator than the "disability causation" rebuttal test at § 727.203(b)(3) would be.

The function of Section 422(c), however, is not to determine whether a claimant is or is not eligible for benefits. Its function is solely to determine whether the benefits to a miner already found eligible for them—here, under Section 402(f)(2) of the Act and the HEW interim provision—are to be paid by an individual coal operator or instead by the Trust Fund. *See* §§ 725.492(a)(1), 725.493(a)(6) (both implementing Section 422(c)). Section 422(c) and its implementing regulations at Part 725 of 20 C.F.R. are merely "processing," not "eligibility," provisions. 43 Fed. Reg. 36825 (1978) ("[T]he *procedures* contained in Part 725 of this subchapter and not those contained in this part [Part 727] are applicable to the *processing* of [certain] claims. Only the medical criteria for determining *eligibility* with respect to such claims are contained in this part.") (emphasis added). Thus, Section 422(c) allows individual operators only to *avoid* liability; application of the section *cannot defeat* the claim of a miner who establishes his entitlement to benefits under Section 402(f)(2) of the Act, which incorporates the HEW interim provision. If an individual operator is able to avoid liability by meeting the "disability causation" proof that Section 422(c) affords, then the Trust Fund is liable for the benefits to which the miner is entitled. 30 U.S.C. § 932(j)(1) (incorporating 26 U.S.C. § 9501(d)(1)(B)).[30]

[30] In *Usery*, the entire Court agreed that individual operators can avoid liability for benefits by making the "disability causation"

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II. SECTION 402(f)(2) DOES NOT VIOLATE THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

In the brief in opposition it filed in this Court, Bethenergy argued that construing Section 402(f)(2) to invalidate the DOL "disability causation" rebuttal test at § 727.203(b)(3) would violate its rights under the due process clause of the fifth amendment to the United States Constitution, U.S. CONST. amend. V. Br. In Opp. at 14-16. Bethenergy maintained that due process guarantees require a statutory scheme under which Bethenergy was afforded an opportunity to prove that John Pauley's disability did not arise out of his coal mine employment. *Id.*

While Bethenergy vigorously pressed the Section 402(f)(2) constitutional issue in its brief in opposition, it did not even raise the issue in the court below. Whether the issue has been properly preserved is therefore questionable, even though we presented it in our petition to this Court. *See Lawn v. United States*, 355 U.S. 339, 362-63 n. 16 (1958).[31]

[30] *continued*
proof that Section 422(c) affords them. 428 U.S. at 35-37; *id.* at 51 (Stewart, J. concurring in part). At the time *Usery* was decided, unlike now, an operator who successfully avoided liability under Section 422(c) also defeated the claim entirely because the Trust Fund did not yet exist. Black Lung Benefits Revenue Act of 1977, Pub. L. No. 95-227, § 3(a)(1), 92 Stat. 12 (1978) (creating the Trust Fund).

[31] The Director contended below that the court should interpret Section 402(f)(2) to permit the Secretary to apply each of the DOL rebuttal provisions so as to avoid "raising the specter of constitutional violations." *Dir. 3d Cir. Br.*, n. 14 *supra* at 28. But the Director took no position as to whether, if the constitutionality of Section 402(f)(2) were considered, it should be held unconstitutional. Accordingly, the Director, like Bethenergy, failed to raise the Section 402(f)(2) constitutional question in the court of appeals. In any event, the Director clearly has no standing to make any

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In any event, Section 402(f)(2), as we urge the Court to construe it, does not violate the due process rights of coal operators. First, Section 422(c) of the Act, which we discussed in § I.C *supra*, completely answers Bethenergy's constitutional challenge. By affording every coal operator the opportunity to avoid liability by proving, *inter alia*, that the miner's disability did not arise, in whole or in part, out of employment in the operator's own mines, Section 422(c) affords operators the very opportunity that—indeed, a broader opportunity than the one that—Bethenergy incorrectly says is unconstitutionally absent from the statutory scheme.

Moreover, Section 402(f)(2) would be constitutional even if the Act lacked a provision like Section 422(c). In *Usery*, coal operators pursued several constitutional challenges similar to the one Bethenergy presses here. *Usery*, 428 U.S. at 20-31. One of the challenges was to what the Court referred to as "§ 411(c)(3)'s '*irrebuttable presumption*' of total disability due to pneumoconiosis based on clinical evidence of complicated pneumoconiosis." *Id.* at 22 (emphasis added). Making short shift of this challenge, the Court analyzed the presumption in terms of its "operation and effect," *Id.* at 24, which was "that operators were bound to provide benefits for all miners clinically demonstrating their affliction with complicated pneumoconiosis arising out of employment in the mines. . . ." *Id.*

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[31] *continued*
due process challenge to the provision. *Dayton v. Consolidation Coal Co.*, 895 F. 2d, 173, 175-76 (4th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3725 (U.S. October 29, 1990) (No. 90-114).

Judge Posner and the late Judge Friendly have sharply criticized the canon that courts should construe statutes to avoid constitutional doubts about their validity. R. Posner, *The Federal Courts* 285 (1987); H. Friendly, *Benchmarks* 210-12 (1967). As we explain in the text, however, that Section 402(f)(2) is constitutionally valid is free from doubt. Accordingly, the canon has no play here.

at 23. Because the Act "regulat[es] purely economic matters," *id.* at 23-24, the constitutional question was simply whether this congressionally dictated outcome was "irrational." *Id.* at 23. The Court concluded that it was not. *Id.* at 23-24.

Even if Section 422(c) did not exist, *Usery* would doom Bethenergy's constitutional argument. In x-ray cases the "operation and effect" of Section 402(f)(2), if construed to invalidate the "disability causation" rebuttal test at § 727.203(b)(3), is to afford benefits to miners (1) who have medical pneumoconiosis *and* (2) whose medical pneumoconiosis arises out of their coal mine employment (or who mined at least 10 years) *and* (3) who are totally disabled from performing their usual coal mine work or comparable work *and* (4) for whom it is "highly probable," though not certain, that their total disability arises, at least in part, out of their coal mine employment. *See* n. 12 and pp. 29-30 *supra*. This "operation and effect" of Section 402(f)(2) is not irrational, *see, e.g., Weinberger v. Salfi*, 422 U.S. 749, 781-85 (1975), and could hardly be irrational when the precursor of Section 402(f)(2)—the HEW interim provision—is properly viewed as the product of a reasonable agency cost/benefit analysis that was responsive to Congress' express wishes. *See* pp. 29-30 *supra*. Therefore, whether a claimant "merits compensation" under such circumstances "is a public policy matter left primarily to the determination of the legislature." *Usery*, 428 U.S. at 21.

CONCLUSION

The judgment of the Court of Appeals for the Third Circuit should be reversed and the case remanded with directions to award Mrs. Pauley black lung benefits.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

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U.S. CONST. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Section 401(a) of the Black Lung Benefits Act, 30 U.S.C. § 901(a) (1988)

Congressional findings and declaration of purpose;

(a) Congress finds and declares that there are a significant number of coal miners living today who are totally disabled due to pneumoconiosis arising out of employment in one or more of the Nation's coal mines; that there are a number of survivors of coal miners whose deaths were due to this disease; and that few States provide benefits for death or disability due to this disease to coal miners or their surviving dependents. It is, therefore, the purpose of this subchapter to provide benefits, in cooperation with the States, to coal miners who are totally disabled due to pneumoconiosis and to the surviving dependents of miners whose death was due to such disease; and to ensure that in the future adequate benefits are provided to coal miners and their dependents in the event of their death or total disability due to pneumoconiosis.

Section 402(f) of the Black Lung Benefits Act, 30 U.S.C. § 902(f) (1988)

(1) The term "total disability" has the meaning given it by regulations of the Secretary of Health and Human Services for claims under part B of this subchapter, and by regulations of the Secretary of Labor for claims under part C of this subchapter, subject to the relevant provisions of subsections (b) and (d) of section 923 of this title, except that—

(A) in the case of a living miner, such regulations shall provide that a miner shall be considered totally disabled when pneumoconiosis prevents him or her from engaging in gainful employment requiring the skills and abilities comparable to those of any employment in a mine or mines in which he or she previously engaged with some regularity and over a substantial period of time;

(B) such regulations shall provide that (i) a deceased miner's employment in a mine at the time of death shall not be used as conclusive evidence that the miner was not totally disabled; and (ii) in the case of a living miner, if there are changed circumstances of employment indicative of reduced ability to perform his or her usual coal mine work, such miner's employment in a mine shall not be used as conclusive evidence that the miner is not totally disabled;

(C) such regulations shall not provide more restrictive criteria than those applicable under section 423(d) of Title 42; and

(D) the Secretary of Labor, in consultation with the Director of the National Institute for Occupational Safety and Health, shall establish criteria for all appropriate medical tests under this subsection which accurately reflect total disability in coal miners as defined in subparagraph (A).

(2) Criteria applied by the Secretary of Labor in the case of—

(A) any claim which is subject to review by the Secretary of Health and Human Services, or subject to a determination by the Secretary of Labor, under section 945(a) of this title;

(B) any claim which is subject to review by the Secretary of Labor under section 945(b) of this title; and

(C) any claim filed on or before the effective date of regulations promulgated under this subsection by the Secretary of Labor;

shall not be more restrictive than the criteria applicable to a claim filed on June 30, 1973, whether or not the final disposition of any such claim occurs after the date of such promulgation of regulations by the Secretary of Labor.

Section 422(c) of the Black Lung Benefits Act, 30 U.S.C. § 932(c) (1988)

(c) Persons entitled to benefits

Benefits shall be paid during such period by each such operator under this section to the categories of persons entitled to benefits under section 922(a) of this title in accordance with the regulations of the Secretary applicable under this section: Provided, That, except as provided in subsection (i) of this section, no benefit shall be payable by any operator on account of death or total disability due to pneumoconiosis (1) which did not arise, at least in part, out of employment in a mine during a period after December 31, 1969 when it was operated by such operator; or (2) which was the subject of a claim denied before March 1, 1978, and which is or has been approved in accordance with the provisions of section 945 of this title.

Section 422(j) of the Black Lung Benefits Act, 30 U.S.C. § 932(j) (1988)

(j) Failure of operators to secure benefits

Notwithstanding the provisions of this section, section 9501 of Title 26 shall govern the payment of benefits in cases—

(1) described in section 9501(d)(1) of Title 26;

(2) in which the miner's last coal mine employment was before January 1, 1970; or

(3) in which there was a claim denied before March 1, 1978, and such claim is or has been approved in accordance with the provisions of section 945 of this title.

26 U.S.C. § 9501(d)(1) (1988)

Expenditures from trust fund.—Amounts in the Black Lung Disability Trust Fund shall be available, as provided by appropriation Acts, for—

(1) the payment of benefits under section 422 of the Black Lung Benefits Act in any case in which the Secretary of Labor determines that—

(A) the operator liable for the payment of such benefits—

(i) has not commenced payment of such benefits within 30 days after the date of an initial determination of eligibility by the Secretary of Labor, or

(ii) has not made a payment within 30 days after that payment is due,

except that, in the case of a claim filed on or after the date of the enactment of the Black Lung Benefits Revenue Act of 1981, amounts will be available under this subparagraph only

for benefits accruing after the date of such initial determination, or

(B) there is no operator who is liable for the payment of such benefits.

20 C.F.R. § 410.490

Interim adjudicatory rules for certain Part B claims filed by a miner before July 1, 1973, or by a survivor where the miner died before January 1, 1974.

(a) *Basis for rules.* In enacting the Black Lung Act of 1972, the Congress noted that adjudication of the large backlog of claims generated by the earlier law could not await the establishment of facilities and development of medical tests not presently available to evaluate disability due to pneumoconiosis, and that such claims must be handled under present circumstances in the light of limited medical resources and techniques. Accordingly, the Congress stated its expectancy that the Secretary would adopt such interim evidentiary rules and disability evaluation criteria as would permit prompt and vigorous processing of the large backlog of claims consistent with the language and intent of the 1972 amendments and that such rules and criteria would give full consideration to the combined employment handicap of disease and age and provide for the adjudication of claims on the basis of medical evidence other than physical performance tests when it is not feasible to provide such tests. The provisions of this section establish such interim evidentiary rules and criteria. They take full account of the congressional expectation that in many instances it is not feasible to require extensive pulmonary function testing to measure the total extent of an individual's breathing impairment, and that an impairment in the transfer of oxygen from the lung alveoli to cellular level can exist in an individual even though his chest roentgenogram (X-ray) or ventilatory function tests are normal.

(b) *Interim presumption.* With respect to a miner who files a claim for benefits before July 1, 1973, and with respect to a survivor of a miner who dies before January 1, 1974, when such survivor timely files a claim for benefits, such miner will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconio[illegible] the time of his death, or his death will be presur[illegible]e to pneumoconiosis, as the case may be.

(1) One of t[illegible]al requirements is met:

(i) A chest ro[illegible]n. [illegible]-ray), biopsy, or autopsy establishes the exi[illegible]ce of pneumoconiosis (see § 410.428); or

(ii) In the case of a miner employed for at least 15 years in underground or comparable coal mine employment, ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2)) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(2) The impairment established in accordance with paragraph (b)(1) of this section arose out of coal mine employment (see §§ 410.416 and 410.456).

(3) With respect to a miner who meets the medical requirements in paragraph (b)(1)(ii) of this section, he will be presumed to be totally disabled due to pneumoconiosis arising out of coal mine employment, or to have been totally disabled at the time of his death due to pneumoconiosis arising out of such employment, or his death will be presumed to be due to pneumoconiosis arising out of such employment, as the case may be, if he has at least 10 years of the requisite coal mine employment.

(c) *Rebuttal of presumption.* The presumption in paragraph (b) of this section may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)), or

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establish that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1)).

(d) *Application of presumption on readjudication.* Any claim initially adjudicated under the rules in this section will, if the claim is for any reason thereafter readjudicated, be readjudicated under the same rules.

(e) *Failure of miner to qualify under presumption in paragraph (b) of this section.* Where it is not established on the basis of the presumption in paragraph (b) of this section that a miner is (or was) totally disabled due to pneumoconiosis, or was totally disabled due to pneumoconiosis at the time of his death, or that his death was due to pneumoconiosis, the claimant may nevertheless establish the requisite disability or cause of death of the miner under the rules set out in §§ 410.412 to 410.462.

20 C.F.R. § 727.203

§ 727.203 Interim presumption.

(a) *Establishing interim presumption.* A miner who engaged in coal mine employment for at least 10 years will be presumed to be totally disabled due to pneumoconiosis, or to have been totally disabled due to pneumoconiosis at the time of death, or death will be presumed to be due to pneumoconiosis, arising out of that employment, if one of the following medical requirements is met:

(1) A chest roentgenogram (X-ray), biopsy, or autopsy establishes the existence of pneumoconiosis (see § 410.428 of this title);

(2) Ventilatory studies establish the presence of a chronic respiratory or pulmonary disease (which meets the requirements for duration in § 410.412(a)(2) of this title) as demonstrated by values which are equal to or less than the values specified in the following table:

	Equal to or less than—	
	FEV_1	MVV
67″ or less	2.3	92
68″	2.4	96
69″	2.4	96
70″	2.5	100
71″	2.6	104
72″	2.6	104
73″ or more	2.7	108

(3) Blood gas studies which demonstrate the presence of an impairment in the transfer of oxygen from the lung alveoli to the blood as indicated by values which are equal to or less than the values specified in the following table:

Arterial pO_2	Arterial pCO_2 equal to or less than (mm. Hg.)
30 or below	70.
31	69.
32	68.
33	67.
34	66.
35	65.
36	64.
37	63.
38	62.
39	61.
40-45	60.
Above 45	Any value.

(4) Other medical evidence, including the documented opinion of a physician exercising reasoned medical judgment, establishes the presence of a totally disabling respiratory or pulmonary impairment;

(5) In the case of a deceased miner where no medical evidence is available, the affidavit of the survivor of such miner or other persons with knowledge of the miner's physical condition, demonstrates the presence of a totally disabling respiratory or pulmonary impairment.

(b) *Rebuttal of interim presumption.* In adjudicating a claim under this subpart, all relevant medical evidence

shall be considered. The presumption in paragraph (a) of this section shall be rebutted if:

(1) The evidence establishes that the individual is, in fact, doing his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(2) In light of all relevant evidence it is established that the individual is able to do his usual coal mine work or comparable and gainful work (see § 410.412(a)(1) of this title); or

(3) The evidence establishes that the total disability or death of the miner did not arise in whole or in part out of coal mine employment; or

(4) The evidence establishes that the miner does not, or did not, have pneumoconiosis.

(c) *Applicability of Part 718.* Except as is otherwise provided in this section, the provisions of Part 718 of this subchapter as amended from time to time, shall also be applicable to the adjudication of claims under this section.

(d) *Failure of miner to qualify under the presumption in paragraph (a) of this section.* Where eligibility is not established under this section, such eligibility may be established under Part 718 of this subchapter as amended from time to time.

20 C.F.R. § 410.412

(a) A miner shall be considered totally disabled due to pneumoconiosis if:

(1) His pneumoconiosis prevents him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 420.424 through 410.426); and

(2) His impairment can be expected to result in death, or has lasted or can be expected to last for a continuous period of not less than 12 months.

(b) A miner shall be considered to have been totally disabled due to pneumoconiosis at the time of his death, if at the time of his death:

(1) His pneumoconiosis prevented him from engaging in gainful work in the immediate area of his residence requiring the skills and abilities comparable to those of any work in a mine or mines in which he previously engaged with some regularity and over a substantial period of time (that is, "comparable and gainful work"; see §§ 410.424 through 410.426); and

(2) His impairment was expected to result in his death, or it lasted or was expected to last for a continuous period of not less than 12 months.

Coal Miner's Benefits Manual (Part IV), § IB6(e)

Cross refer subsection IB6(e) of TI #21 to subsection IB9(g)(1) of TI #21.

(e) *Rebuttal of Interim Presumption.*—A finding of total disability under the interim medical criteria set forth above may be rebutted if:

(1) There is evidence that the individual is, in fact, doing his usual coal mine work or comparable and gainful work, *or*

(2) Other evidence, including physical performance tests (where such tests are available and their administration is not contraindicated), establishes that the individual is, in fact, able to do his usual coal mine work or comparable and gainful work, *or*

(3) Biopsy or autopsy findings clearly establish that no pneumoconiosis exists (see C.2.).

Coal Miner's Benefits Manual (Part IV), § IB9(g)(1), (2)

(g) *Work Activity*

(1) *The Effect of Work Activity on Entitlement.*—While noncomparable work activity would generally not have a direct rebutting impact on the black lung decision, all recent or continuing work activity must be considered in evaluating the case. The weighing of the fundamental capacity demonstrated by recent work of any kind, especially heavy work, may be particularly critical in cases where a decision has to be made since it may raise a question about the individual's functional capacity.

In addition to the foregoing, continuing performance of coal mine or comparable and gainful work on or after the date of application through the date of adjudication will rebut a finding of disability (except in the special case where complicated pneumoconiosis exists). If such work is recent, but has stopped because of disability due to pneumoconiosis before the date of adjudication and a finding of total disability is otherwise indicated, onset of disability can be established as of the first day of the month in which the miner meets all of the requirements of entitlement, including the absence of demonstrated ability to perform coal mine or comparable and gainful work.

On the other hand, if a miner returned to coal mine or comparable and gainful work or any type of heavy work within 12 months of his application date, this may raise a serious question as to whether the durational requirement of the law (see IB2(c)) is met. Such cases should be referred to DDPP, MBB, Room T-7154.

As indicated above, although the functional capacities demonstrated by gainful noncomparable work must be considered in reaching the black lung decision, such work in itself would ordinarily not bar entitlement. However, the miner would be subject to reductions on account of excess earnings (MBM 530).

A special exception to the general rules on noncomparable work is the continuing performance of heavy work. This in itself is evidence that the miner has the physical capacity for doing work involving the whole range of physical requirements from sedentary to heavy. This would be equivalent to the evidence produced by exercise testing. Accordingly, total disability would be rebutted, unless the miner has complicated pneumoconiosis. In other words, such work would be treated in the same way as gainful coal mine or comparable work.

(2) *Comparable and Gainful Work.*—This section deals with the issue of whether the recent or continuing non-coal mine employment of the miner is both comparable to his usual coal mine employment and gainful.

A miner working in non-coal mine employment would ordinarily not be found to be engaging in comparable and gainful work activity under the following circumstances:

- Actual earnings are below the SGA level
- Regardless of earnings, the work activity is not comparable in terms of skills and abilities to those of his usual mine work activity.

Where earnings from non-coal mine work are at the "gainful employment" level, the determination as to whether such work is also "comparable" requires an assessment of all the facts concerning the work activity.

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